The Critical Role of

Trust Between Employees and Employers

in the Development of Workplace Law

Legal and Ethical Challenges

From Whistleblowers to Government Cyber-Searches

and the

Remaking of the Trusted Employer

Six Practical Strategies for Regaining Employee Confidence

"Warren Buffet said… that trust is like the air we breathe. When it is present, nobody really notices. But when it's absent everybody notices."

Entrepreneur Magazine, October 2002
(C. Sandlund, "Trust Is a Must")

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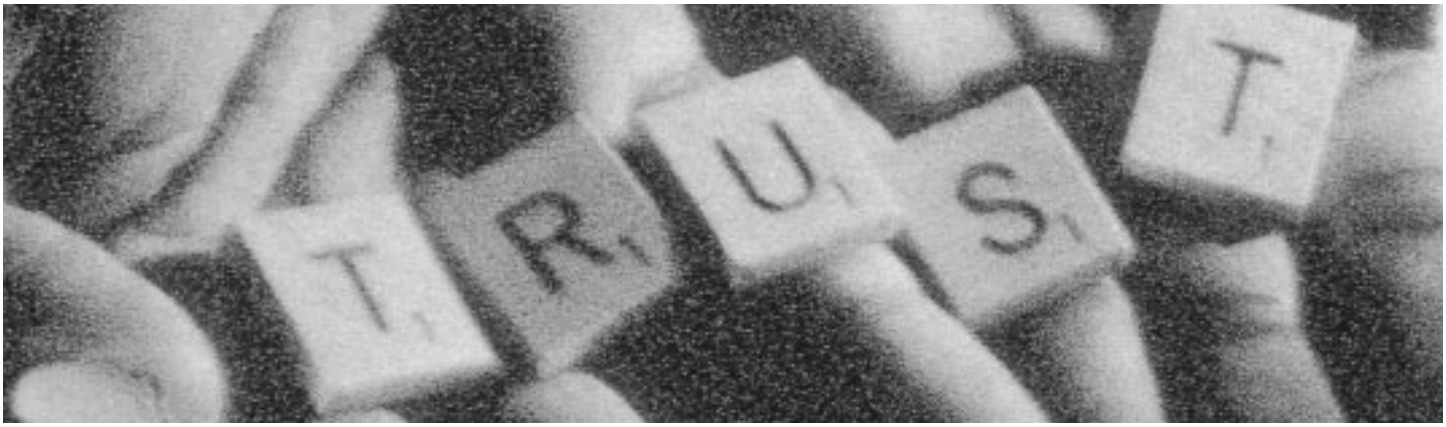
This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. This white paper is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues which inevitably arise in any employment-related dispute.

The Critical Role of Trust Between Employees and Employers in the Development of Workplace Law



Introduction

Trust in the workplace is under continuing attack. Each week the media report another name brand employer being accused of falsifying earnings and engaging in post-Enron financial corruption. For example, on April 3, 2003, five corporate leaders of HealthSouth pleaded guilty to conspiring to inflate earnings by as much as $2.5 billion. Eight months earlier, the stock of the company had plunged by 44 percent in a single day, never to recover. The Company was delisted from the New York Stock Exchange after declining from over $25.00 a share to less than a $.25 trading on Pink Sheets. On April 1, 2003, the Chief Executive Officer was fired by the Board of Directors and is accused of inflating earnings by the SEC. The Agency announced that it would seek $743 million in penalties, forfeiture of illegal profits and triple damages if the charges were proven. The Company has defaulted on $367 million in bond and interest payments and announced the planned layoff of 165 office workers. *See The New York Times*, April 4, 2003, at C2.

The above story is unfortunately just another "cluster bomb" explosion shattering the confidence of not only the investment community, but also of employees in the workplace. For many decades, while the economy has traveled through its cycles, and wars have come and gone, the relationship between the employer and the employee has remained remarkably positive. While sitcoms and movie scripts depicted the "employer" as the citadel of greed and bad faith, this has not been the way in which employees view employers, especially "their" employer. However, in the last two to three years, the financial scandals and shocking revelations of misconduct by some of our most trusted institutions have shaken employee trust as never previously experienced. Lost retirement accounts, meaningless stock options, and mass layoffs have unavoidably had their effect. Employees now question the credibility of employers generally and increasingly doubt the veracity of senior business leaders. This lack of trust acts much like a vacuum, creating a powerful force drawing into the workplace substitute mechanisms intended to regulate employer conduct, including new legislation, federal and state administrative regulations, and judicial intervention.

The misfortunes of HealthSouth illustrate how the growing "trust vacuum" draws governmental intervention. In that regard, meet Ms. Alice H. Martin, a 46-year old former nurse. She gave up a career of healing the sick to attack another social ill-crime. She obtained a law degree and now holds the position of U.S. Attorney in Birmingham, Alabama. Little did she know that events taking place in the workplace would bring her into national prominence as a soldier fighting a war against corporate crime. She is the government prosecutor involving the executives of HealthSouth.

In September 2002, Ms. Martin and other regional U.S. Attorneys participated in a conference on corporate fraud and white-collar crime with Attorney General John Ashcroft. In

combination with top officials from other law enforcement agencies, plans were developed for a "blitzkrieg on corporate crime." Using the newly passed Sarbanes-Oxley Act, the plan was to create a "real-time prosecution of corporate crime." Every case was listed as "Priority A." Armed with this new legislative artillery, Ms. Martin sought the Act's first convictions at HealthSouth. Five guilty pleas were received to charges of conspiracy to commit wire fraud, securities fraud, and filing false records, according to Ms. Martin. The convictions did not recognize the glass ceiling in corporate America, as four out of the five were women executives. Ms. Martin described the prosecutions as moving at warp speed." This activity signals a new age in federal enforcement as a method of punishing those who have abused a role of trust. *See* generally, *id*. at C2; *The Wall Street Journal*, April 4, 2003, p. C1.

This breakdown of trust and the resulting reaction from the public, government, and employees extend far beyond the corporate scandals which have been widely exposed since the collapse of the dot.com economy. This loss of trust also comes from systemic causes, including weakened job and benefit security, and changes in employee expectations, particularly in such areas as privacy and workplace safety. It also comes from class action litigation resulting in multi-million dollar settlements for alleged bad behavior ranging from race discrimination and sexual harassment to misclassifying employees to avoid overtime. The result has been that the sense of trust, of a degree of common interest between employers and employees, however warily maintained, has been damaged, even for those companies which have made a determined effort to "do the right thing."

Nonetheless, and even surprisingly given the developments of the last few years, the fact remains that the sense of trust, though strained, is not broken. Numerous surveys confirm that most employees consider themselves loyal employees. They believe that the recent corporate scandals will make whistleblowing more common, not less, and that such complaints will be treated seriously. Most important, for whatever criticisms they may have of companies generally, and particularly those which have found themselves in the eyes of scandals, most employees still believe that their own companies are trustworthy. These beliefs afford employers a cushion of good will and an opportunity to redress the loss of trust now visible in many quarters. Moreover, and critically, analysis confirm that companies which rate well on various measures of employee trust and job satisfaction are likely to perform better from a financial standpoint, including return to shareholders.

In examining workplace trust, Littler has the unique opportunity to view this issue as it applies to tens of thousands of employers and employees. Never before have we seen more symptoms of erosion or diminished confidence generally in the ethical behavior of management. While this often does not apply to the employee's immediate employer, it shapes the view of the workplace generally. This breakdown of trust has resulted in increased litigation, more complaints being filed with government agencies, and more public pressure for new workplace laws. We have divided this activity into six areas: (a) increased whistleblower claims and protections; (b) continued growth in retaliation claims as part of lawsuits under current workplace laws; (c) safety complaints ranging from concerns about chemical biological threats in the workplace to concern regarding SARS; (d) new benefit laws and regulations to protect employee investments; (e) concern over the destruction of workplace privacy, including the potential for identity theft because of a failure to protect electronic personnel information; and (f) an explosion of state-initiated legislation to compensate for the perceived breakdown in employer trustworthiness. These challenges demand a dramatic and strategic response by responsible employers. Presented in this paper are several practical solutions and recommendations of what employers need to do to position themselves as leaders in rebuilding a sense of trust with their employees, as well as preserving that trust where it still exists. In 2003 and 2004, this agenda promises to be the most important series of tasks to be undertaken and managed by human resource leaders and corporate counsel responsible for employment and labor law compliance. These activities will not be measured merely in reduced litigation and affirmative defenses. Protecting and rebuilding employee trust will be measured in increased productivity and reduced costs. The significance of this contribution to an organization's ROI is so great that it may become one of the primary determinates of economic success and ultimate business survival.

Part One:
LEGAL AND ETHICAL CHALLENGES: FROM WHISTLEBLOWERS TO GOVERNMENT CYBER-SEARCHES

A. Causes and Symptoms of The Loss of Workplace Trust.

1. **Financial Underreporting and Corruption**. The most obvious place to look in searching for events which have created an atmosphere of distrust is the corporate financial scandals and financial implosions of the past year. In the most visible episodes, involving Enron, WorldCom, Tyco, Global Crossing and Adelphia, millions of Americans received an unwelcome education in how companies could generate misleading and/or incomplete corporate reports, off-the-balance sheet transactions apparently serving no legitimate business function, outright theft, and means used by upper management to protect itself financially at the expense of employee pensions and shareholder value. Perhaps worse, they saw exposed how one of the world's most trusted accounting firms appeared at best unable to serve its protective function and at worst, actively assisted in management misconduct.
Moreover, there remains the concern that the legal system may not be able to undo the damage. It is unclear what civil and/or criminal liability will attach to the participants and how high up the chain in command such liability will extend. There will no doubt be extensive civil litigation and class actions involving these entities, but at the end of the day, no one can be sure how much will be recovered for employees and shareholders and how much will go to the attorneys. The only thing certain is that enormous amounts of money-in the form of deflated pension accounts and capital losses, and untold amounts of work hours devoted by employees to building these companies with the expectation of sharing in the rewards of their success-are irretrievably lost.

2. **Publicly Reported Multi-Million Dollar Settlements For Alleged Harassment and Discrimination of Employees By Major Employers (Especially Class Action Claims)**. This is not to say that the only corporate activities fueling a sense of distrust are acts of actual or perceived fraud. In recent years, the country has seen settlements and verdicts of large class actions involving allegations of discrimination and other improper conduct. By way of two examples only, Texaco settled a racial discrimination class action involving some 1,400 employees by agreeing to pay $115 million and affording each of the class members a one-time salary increase of 11 percent.[1] Late last year, an age discrimination case filed against Gulfstream Aerospace Corp. by the EEOC was settled for payment of $2.1 million, plus significant injunctive and remedial relief, to 61 former employees who lost their jobs during layoffs at the company's Savannah, Georgia, facility.[2] Obviously many more such lawsuits have been resolved, by settlement or trial, and more are in process.

3. **Clearly, these developments have fueled an undeniable rise in employment-related litigation**. Of the approximately 268,000 federal civil lawsuits filed in the twelve months ending June 30, 2002, a total of 38,587 were denoted on the civil cover sheet either as "Civil Rights-Employment," or involving labor laws, such as the Fair Labor Standards Act, the Labor Management Relations Act, and others. This figure not only constitutes 14.4 percent of all federal civil lawsuits during this period, but also represents an increase of slightly more than 10 percent in the number of such filings during the twelve-month period ending June 30, 2001. Indeed, in that earlier period, filings of this nature constituted only 13.8 percent of all federal civil actions, meaning that employment-related lawsuits at the federal level are increasing both in number and as a percentage of the federal caseload.[3] We at Littler Mendelson see comparable rises in state court litigation on an anecdotal basis.

Another method allowing employees to make claims against employers are actions under the False Claims Act, also known as "*qui tam*" actions. These claims provide employees, and others, with the opportunity to alert the government to possible wrongdoing and to receive a portion of monies recovered by the government. Although the number of these cases filed has now dropped to a level not seen since FY 1995, the amount recovered in those actions has increased from $246.8 million to $1.12 billion in FY 2001.[4]

4. **Economic Downturn**. These instances of alleged or actual misconduct tell only part of the story. Of at least equal, if

[1] http://www.texaco.com/archive/diversity/press/pr11_15.html.

[2] http://www.eeoc.gov/press/12-11-02.html.

[3] "U.S. District courts — Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending June 30, 2002," available at http://www.uscourts.gov/caseload2002/contents.html.

[4] "False Claims Act — Qui tam statistics," available at http://www.all-about-qui-tam.org/fca_stats.shtml.

not greater, significance are the broader changes in the economy, particularly since the dot.com boom began to recede in late 2000. The recent economic statistics, and particularly those for 2002, tell a sobering and sometimes worrisome tale. The manufacturing sector recorded a 3.7 percent employment decline, following a 6.7 percent slide in 2001. Retail employment fell by 0.8 percent, even though consumers continued to spend. The unemployment rate increased, as did the number of people out of work and the duration of the average period of unemployment.[5] For the period January 2001 through September 2002, the economy absorbed over 13,000 mass layoffs and the termination of approximately 2.8 million employees, according to the Bureau of Labor Statistics.[6]

The most conspicuous and newsworthy sector to have suffered job losses was the high-tech area, which announced a total of 1.16 million job cuts during 2001 and 2002, according to Challenger, Gray & Christmas in Chicago.[7] As has been discussed repeatedly in virtually every outlet of the media, the dot.com and high-tech revolutions which were supposed to transform the American economy, which created massive amount of paper wealth, and which fueled an enormous number of job changes as employees sought the chance to be in on the ground floor of an extraordinary opportunity, have not panned out as planned.

5. **Greater Concern For Workplace Ethics**. Finally, we believe that the terms of the debate about employer conduct are beginning to shift. Just a month ago, Goldman Sachs dismissed two prominent investment bankers who had been accused of unwanted and inappropriate sexual advances to a less-senior female investment banker. What was interesting about the story was not the tale of alleged sexual harassment, hardly an unusual accusation in the financial services area, but how the incident was being categorized. A representative from a group of women who had worked at Goldman Sachs was quoted in *The New York Times* as saying that the incident, and the company's response, "goes right under the category of ethics, and we are in a whole new climate."[8] Whether intentionally or otherwise, this spokesperson's comment reflected how issues of discrimination, harassment, and other conduct which often provoke inflammatory rhetoric on both sides may wind up being couched in terms of ethics, which place even greater pressure on employers to prevent such conduct or to act swiftly when it surfaces.

B. Measuring and Defining the Decline in Public and Employee Trust of American Business.

The above developments have unquestionably soured the public on the conduct of employers and the level of trust to which they have traditionally been accorded. These concerns were reported vividly, particularly in light of the corporate and accounting scandals of Enron, WorldCom, Tyco, Adelphia, and Arthur Andersen. A *USA Today*/CNN/Gallup poll from August 2002 found that only 10 percent of adults surveyed thought that corporations can be trusted "a great deal" to look out for the interests of employees, while 50 percent of the respondents said that corporations can be trusted only a little, or not at all, to do so. Forty percent of the people surveyed expressed the opinion that executives are interested only in looking out for themselves, even if that harms the corporation itself.[9]

Comparable findings emerged in a survey taken in early 2002 by Watson Wyatt. This poll, which sought opinions of 12,750 employees at a wide range of job levels and in different industry sectors, found that the employee confidence in senior management dropped from 50 percent in 2000 to 45 percent in 2002. Similarly, only 52 percent of employees rated their companies favorably on their ability to establish "lines of sight," or making connections between their jobs and business goals, a rating which was at 65 percent only two years earlier. Further, and particularly damaging to the goal of trying to retain high-performance employees, only 30 percent believe that high-performing employees are rewarded and only 35 percent agree that job performance and pay are limited.[10]

And yet, despite these figures and the unflattering portrait they paint, polls make clear that Americans, and particularly employees, still have a degree of trust, if not in the system generally, then at least in the company for which they work. Just as many voters condemn Congress as a whole but tend to have favorable opinions of their own senators or representatives, employees continue to believe that their companies

[5] "U.S. Labor Market in 2002: Continued Weakness" in *Monthly Labor Review*, February 2003.

[6] "Mass Layoffs Summary," issued by US Department of Labor, Bureau of Labor Statistics, November 13, 2002, available at http://www.bls.gov/news.release/mslo.nr0.htm.

[7] "High-Tech Sector Made Fewer Layoff Announcements in 2002, Challenger Says," in Daily Labor Report, January 9, 2003.

[8] *The New York Times*, March 7, 2003, page C1

[9] "Employees' new motto: Trust no one," *USA Today*, August 15, 2002 ("*USA Today*").

[10] "WorkUSA®2002 — Weathering the Storm: A Study of Employee Attitudes and Opinions," issued by Watson Wyatt Worldwide, available at http://www.watsonwyatt.com/research("Watson").

continue to deserve their trust. The same *USA Today*/CNN/Gallup poll referred to above found that 50 percent of the respondents have "a lot of trust" in their companies' promises to them and other employees, an increase from a similar poll thirteen years earlier in which only 43 percent of adults shared that view.[11] A *Wall Street Journal*/NBC News poll taken in June 2002 showed that 33 percent of Americans thought that the Enron scandal was typical of many or most American corporations.[12] High as this number may be, it also means that two-thirds of Americans are prepared to believe that the scandals represent examples of aberrant behavior.

Most companies still apparently retain the trust of their employees. For example, a survey taken in May 2002 by Right Management Consultants—Great Lakes Region and EPIC-MRA of Lansing, Michigan found that three-fifths of responding employees in Michigan and Northern Ohio trust the top leaders in their organization to "do the right thing" in the treatment of their employees. In fact, 63 percent of the respondents opined that more employees will be likely to engage in whistleblowing and 71 percent believe that top business and corporate leaders will be more accountable after the Enron scandal.[13] Certainly, the public acclaim and Time "Man of the Year" honors granted to the women who came forward about financial problems within Enron and WorldCom have elevated legitimate whistle-blowers into a highly praised category.

C. The Vital Importance of Workplace Trust in Determining the Economic Success of Business.

The ultimate question, of course, is whether any of this has any impact on the ultimate economic goals of the companies involved. The fact is that wholly aside from concern about ethics and morality in the noblest sense, and a desire to avoid employee lawsuits or worse, from a more pragmatic standpoint, the issue of employee trust has a direct and tangible impact on the employers' bottom line. First, and most obviously, it affects staff stability. The Ohio/Michigan survey found that 71 percent of respondents thought of themselves as completely or mostly loyal to their employers. Watson Wyatt found that employee commitment actually increased from 55 percent in 2000 to 57 percent in 2002. There is no doubt that retention of workers and the minimizing of retraining costs and other expenditures associated with significant turnover keeps expenses down and operations efficient.[14]

More critically, Watson Wyatt's research showed that companies marked by high employee commitment outperform low-commitment employers to a significant degree in shareholder value. In 2000, the high-commitment companies outperformed low-commitment companies by 47 percent, but in only two years, that figure jumped to 200 percent. Companies with high trust levels from their employees outperform their low-trust counterparts by 186 percent. The analysis also revealed that companies which manage change effectively vastly outperform those which do not, as measured in total return to shareholders, and that companies in which employees believe that communication from management is good have a clear edge in shareholder return.[15]

The data clearly suggests that employers face a crisis of trust and that while much of it may be the making of companies which are not in their control, or economic trends to which they are subject, they bear the impact of these unfortunate developments. The same data also shows that employers who recognize the problem on a general level, and who are willing to examine their own organizations in an honest manner, have an unmistakable opportunity to set things right and distinguish themselves. They start with a workforce which, for all the Enron, WorldCom, Andersen and other stories and the skepticism they have generated, still wants to believe and trust in management and is prepared to give senior leadership the benefit of the doubt.

The rewards for actions taken on this path are clear. By taking steps to make sure that employees believe what they are told, are made to understand that they will be treated as trusted members of the business team, trust that the company will look out for them, financially and otherwise, and that coming forward with information about corporate shortcomings will be respected and not dismissed or punished, corporations will benefit from a more stable and more productive workforce and will place themselves in the position for improved financial performance.

[11] *USA Today*.

[12] "Trust is a Must," *Entrepreneur Magazine*, October 2002.

[13] "Post-Enron Wake-Up Call: Most Employees Have Confidence in Business Leaders To Do 'The Right Thing'," reported at www.envoynews.com/detroit/e_article 000076344.cfm ("Wake-Up Call").

[14] Watson.

[15] Watson.

D. Legal and Ethical Challenges Have Directly Evolved From the Decline of Trust in the Workplace.

Each year, new challenges, or new versions of old challenges, develop for employers, and this past year has been no exception. However, many of the areas of interest, and many of the legislative responses, all return to the same theme, namely, can employees trust the companies to which they devote so much of their time and effort, and the managers in charge of those companies? Will efforts to support corporate honesty be appreciated or shunted aside? How will the company protect them from the possibility of violence in the workplace? Will their financial stake in the enterprise be as secure as business conditions allow?

A corollary series of questions is, to what extent do employers value their employees and treat them like important members of the business team? There can be no doubt that employers whose staffs believe that they are treated fairly, with respect and with a sense that they are mature adults who can be trusted to devote the necessary amount of effort to the business goals of the company, will find themselves less prone to turnover, loss of productivity or poor morale. With that said, what have been the primary areas of concern in the past year and how have the laws forced employers to adapt?

1. **The Whistleblowing Explosion and Increased Legislative Protections**. Clearly, the most visible issue, even if not yet the most common in the judicial system, is that of the whistleblower. The success of Cynthia Cooper and Sherron Watkins in bringing misconduct at WorldCom and Enron to light has made the whistle-blower a corporate, if not a national hero figure. The accolades that they earned were well-deserved and unfortunately, the likelihood is that there are, and will be, other examples of misconduct to be uncovered. However, and equally unfortunately, this new environment will no doubt encourage low-performance employees, or employees nursing a grudge or looking to extort money or other benefits to wrap themselves in a whistle-blower's mantle and then claim protection from discipline or termination.

As discussed below, it is our belief that corporations need to recognize that it is important that conscientious employees be encouraged to come forward with their concerns. Such conduct actually represents and should be seen as an act of faith by the employee in the entity-an implicit statement that the company is worth protecting and that coming forward will not be punished. To a certain extent, such protection is now required by the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), one of the most prominent pieces of corporate reform legislation ever enacted and an imperfectly drafted response to the problems brought to light by Enron and WorldCom.

Sarbanes-Oxley is designed primarily as an accounting practices and corporate disclosure statute, but it certain contains provisions that employers must bear in mind. The Act specifically protects employees of a publicly-traded company who provide information, or assist in investigations, about actions that they reasonably believe to constitute violations of federal securities law, or the rules of the SEC, or "any provision of Federal law relating to fraud against shareholders." The protected disclosures include information made available not just to regulatory or law enforcement agencies or Congress, but also to any person with supervisory authority over the company or any person at the employer with the power to "investigate, discover or terminate misconduct."

Thus, not only would this section protect the Enron and WorldCom whistleblowers but, in theory, would afford federal statutory protection to an employee who reported even minor levels of expense account fraud, which arguably affects shareholders. The Act also requires public companies, through their Audit Committees, to provide procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters. It is important to note that the Act's whistleblower protection covers not only publicly traded companies, but also their officers, employees, contractors, subcontractors and agents. Presumably, it applies to contractors and subcontractors, and their individual officers and employees, only in relation to their work for a public company, and even then, only in connection with the alleged fraud being reported, but again the Act is not explicit in this regard, leaving it open to an interpretation far broader than intended, or generally believed.

The Act's allocation of the burden of proof, whether in administrative proceedings before the Department of Labor or in a federal District Court, clearly favors the employee. Initially, the employee must only prove that the protected activity was "a contributing factor" in the unfavorable employment decision; the employee need not contend, or even prove, that his or her protected activity was the only reason for the retaliation, or even a significant reason. In addition, the language of Sarbanes-Oxley suggests that the employee must prove this part of his or her case "by a preponderance of the credible evidence." By contrast, the employer must demonstrate "by clear and convincing evidence" that it would have taken the same unfavorable action even in the absence of the protect-

ed activity by the employee. Obviously, this is a much harder burden to meet and forces the employer to "prove a negative"—namely that the activity of the employee played no role in the employment decision.

In another highly significant provision, anyone intentionally retaliating against an employee who provides truthful information to a law enforcement officer relating to the commission or possible commission of "any Federal offense" is subject to a fine and/or imprisonment of not more than 10 years. This is particularly important in the employment context, because the Act specifically includes "interfering with the lawful livelihood or employment of any person" as a type of prohibited conduct. As a result, this new provision arguably subjects individuals to criminal liability if they are involved in a termination or other adverse employment decision related to any of the broad range of federal crimes. Thus, it raises the possibility that a supervisor who takes retaliatory steps toward an employee reporting information about violation of any federal criminal statute, not just employment-related matters, could face criminal charges and incarceration. Critically, this Section is not, by its terms, limited to publicly held companies but applies to any employee of any company who brings forward information about the actual or possible commission of a federal one.

In addition, Sarbanes-Oxley amends the existing witness tampering statute and prohibits the destruction, alteration, or concealment of any document with the intent to impair its integrity or availability for use in an official proceeding. Such conduct is punishable by fine and/or up to twenty years of imprisonment and the statute is not limited to public companies. Moreover, the Act bars the destruction or alteration of documents, and also the falsification of documents or making of any false entry in a document. This section is not limited to documents intended for use in an official proceeding, but bars any act intended to impede, obstruct or influence the "investigation of any matter within the jurisdiction of any department or agency of the United States or any bankruptcy case, or in relation or contemplation of any such matter or case." Again, the punishment is a fine and/or imprisonment for up to twenty years. Conceivably, this provision is broad enough to cover any document which would be relevant to a wage and hour audit or investigation, an investigation by OSHA, the EEOC, or similar matters and certainly any proceeding in which financial whistleblowing is in any way an issue.

In passing the Act, Congress also focused on a series of issues dealing with executive compensation and pension plans and reflecting its concern that members of management were making large amounts of money while not ensuring that their companies were meeting basic ethical standards and in fact, reaping the benefits of questionable transactions while undermining the well being of companies they were hired to save. Thus, the statute prohibits public companies from making loans or arranging for loans or credit to be provided to any director or executive officer. The only exception is for certain kinds of loans that the company makes available to the general public in the ordinary course of business, such as home improvement loans, consumer credit, credit cards, or extension of credit by a broker or dealer as permitted under the Exchange Act. Loans in existence as of the effective date of the Act are not affected, but they may not be rolled over, extended, modified, or otherwise revised. Many types of loans which had been common in executive compensation, such as for relocation costs, extraordinary expenses, or to purchase shares of company stock and split-dollar life insurance plans are now barred.

Similarly, the Act provides that if a company is required to restate its earnings because of noncompliance with financial reporting requirements caused by misconduct, the chief executive officer and chief financial officer must return to the company either profits they made during the prior year on the sale of the company's stock, or their bonus or other incentive or equity-based compensation during that period, whichever is less. Littler has published extensively on the workplace impact of Sarbanes-Oxley and what is required for compliance. *See The 2003 National Employer*, Chapter Two; "Employment Law Implications of Corporate Responsibility Legislation," *Littler Mendelson ASAP*, August 2002 and ABA Tort Trial and Insurance Practice Section Committee News, Fall 2002

The new rules laid out by Sarbanes-Oxley and comparable state legislation clearly represent a changed environment for employers. However, and as discussed below, we do not view them as the outer edge of the new rules of corporate behavior. Instead, we see the spirit of Sarbanes-Oxley as a guidepost to how companies can ensure ethical behavior by management, and to win the trust of employees in that new level of honesty. Moreover, surveys taken since Enron and the public focus on the role of whistleblowers, show a strong anticipation that whistle-blower claims will become more common.[16]

[16] "Wake-Up Call, supra n. 13

2. **Retaliation Claims and Their Continued Growth**. Littler has been carefully monitoring the growth in retaliation claims associated with employment law litigation. These claims have continued to increase each year and now represent slightly more than 25 percent of the claims filed with the EEOC.[17] This federal trend has been mirrored in state claims and state litigation. Clearly whistleblower claims represent a form of retaliation cases, but these claims often arise through specific statutes, have special damage provisions, and not infrequently raise the specter of criminal prosecution. Nonetheless, there is a close legal identify between a retaliation claim and a whistleblower claim. Protective activity is required, adverse employment action must be established, and most important, a causal relationship must be proven between the protected activity and the adverse action. *See The 2003 National Employer*, Section 54 (pp. 120-124).

Three more recent cases demonstrate the contexts in which these claims are often made. In Ford v. General Motors Corp., an African-American quality inspector claimed that his two fellow inspectors, who were both Caucasians, were racist, and wanted to make life unbearable for him, so that he would quit.[18] The plaintiff punched one of the Caucasian inspectors during a heated altercation. The plaintiff was fired then reinstated following a union grievance. In between his termination and reinstatement, the plaintiff filed a charge with the EEOC. Following his reinstatement, he was told he was on a 'last chance' status. He was bounced around from position to position before eventually being returned to his original department, albeit in a different capacity. With each position, the plaintiff complained that he was set up to fail by his employer because he was given too much work, and constantly scrutinized by members of management. The court held that the plaintiff's allegations were sufficient to survive summary judgment because it was possible to infer that the employer overworked the plaintiff and over-scrutinized him in retaliation for filing a charge of race discrimination with the EEOC five months before being returned to his original department.

Second, a receptionist was permitted to proceed with her retaliation claim against her former employer, based on evidence that she received a lower pay raise and annual bonus than she had been promised shortly after complaining about inappropriate comments made by a company executive at a holiday party. The receptionist alleged that one month before the incident, she had been persuaded to stay at the company by a manager who led her to believe that she would be given a raise to $35,000 and a $10,000 bonus. A few weeks later, the firm held its annual holiday party, which she attended. Another manager, who had become very intoxicated, approached her and began making sexually explicit remarks, including telling her that he admired her breasts and thought she could make more money working at Hooters. The following day, she reported the conduct. Later that day, she was told her salary increase was only to $32,000, and her bonus, $6,000. The court found that the close proximity of the events suggested a causal link between the receptionist's complaint and her reduced raise and bonus.[19]

Third, in Vadie v. Mississippi State University, the Fifth Circuit ruled that a university faculty applicant could proceed with his retaliation claim.[20] The professor, who had a degree in petroleum engineering, filed an EEOC charge claiming he had been denied a transfer to the chemical engineering department because of his national origin. Two years later, he was again denied a position in the same department because he did not possess a chemical engineering degree. The court of appeals upheld a jury verdict finding retaliation; after the professor filed his EEOC charge, the university changed the qualifications for the position in the department to require that applicants hold a degree the university knew the professor did not possess.

One of the reasons that these claims can be so dangerous is the willingness of a jury to make a compromise finding against an employer. For example, if an employee claims that they made a complaint of sexual harassment and after an investigation, the employer terminated or took adverse action against the complaining employee, the jury may be persuaded that indeed the employer was not guilty of sexual harassment, but clearly was offended and upset with the plaintiff for the complaint. Accordingly, a non-meritorious claim becomes the "protected activity" used to explain the later adverse action (such as termination) of the employee. With the expected growth of whistleblower claims, it is only reasonable to assume that more employees will qualify for protection against retaliation. This will demand an increasingly excellent investigation process under the direction of

[17] Reported in "Charge Statistics FY 1992 Through FY 2002," available at http://eeoc.gov/stats/charges.html.

[18] 305 F.3d 545 (6th Cir. 2002).

[19] Russ v. Van Scoyoc Assocs., Inc., 122 F.Supp.2d 29 (D.D.C. 2000).

[20] 218 F.3d 365 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001)

the Human Relations and Legal departments. When this involves a top-level corporate representative, there may be a strong basis for considering the use of an outside and more impartial investigator. Several innovative strategies exist for such corporate investigations. See Littler publication, *Conducting Lawful Investigations*, Lilly, Kevin and Viera, Claudia (2002).

3. **Workplace safety and violence**. Another, and more difficult area in which employers need to demonstrate that employees should trust them is the area of physical safety and workplace violence. For obvious reasons, employees want and indeed, need to believe that the companies for which they work will do everything necessary to make sure that they can conduct their jobs in safety and return home to their families at night. They seek this protection not only from the outside world, but also fellow employees whose history shows that they are prone to violence or other unacceptable behavior. The issue of safety covers a wide range of topics, such as background checks, workplace violence, and hiring of sex offenders, among others.

Littler predicts that 2003 and 2004 will likely experience one of the most significant "trust" issues since the beginning of the AIDS epidemic. Currently U.S. business in Asia is experiencing the impact of the early stages of SARS. Several workplaces have closed and others are quickly undertaking protective activity. A review of the CDC web-site provides information on SARS and recommended protective activity. As cases increase in the U.S., each employee will eventually ask the question of whether he or she can trust the employer to take all the necessary protective measures. When will the potential safety hazards rise to such a level that the employer closes an operation or send employees home? It is entirely possible that SARS will far exceed the war with Iraq in its adverse impact on the American economy. How employers and their Legal and HR departments respond to this crisis may have as much impact on trust as any of the other issues cited in this paper.

Turning to another workplace safety topic, in 2002, at least twenty-six states passed new laws concerning criminal background checks of employees and prospective employees.[21] They include laws:

- Requiring background checks on applicants and/or employees in specified fields of employment;[22]
- Permitting background checks of applicants and/or employees;[23]
- Requiring disclosure of criminal history for employment in certain fields;[24]
- Codification of process for acquiring and reviewing criminal history background information in Delaware;[25] and
- Amendments to the District of Columbia Health Care Facilities Unlicensed Personnel Background Check Act of 1998.[26]

To ensure the safety of both employees and residents, Minnesota enacted a law permitting residential treatment facilities to disclose to a prospective employer the contents of an employee's personnel file, including acts of violence, theft, harassment or illegal conduct. *See BNA Daily Labor Report, Special Edition*, Minnesota, Ch. 396. Unless the disclosure is fraudulent, no action may be brought against the employer for disclosing this information. *Id*. The same Minnesota law also made it possible, with the informed written consent of the employee, for designated public or charter school officials or administrators to release to a school district personnel data related to documented violence toward or sexual contact with a student. *Id*.

Protecting employees from violence from outside the workforce is another priority. Prior to 2002, approximately fifteen states already had laws protecting employees from stalking-related workplace violence. *See The 2002-2003 National Employer*, Ch. 26, §§ 857-59. In the last year, Indiana, Kentucky, and Tennessee all joined this trend and passed laws relating to protection of employees against stalkers. For example, in Indiana and Tennessee, an employer may now

[21] Those states are: California, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia.

[22] See attached table—EXHIBIT A.

[23] See attached table—EXHIBIT B.

[24] Applicants in home, child, foster, community, and resident care, as well as banking and other professions must disclose. *See BNA Daily Labor Report, Special Edition*, California, Chs. 627, 990. Employees of licensed health care facility must sign affidavit stating not convicted or guilty of specific offenses. *See BNA Daily Labor Report, Special Edition*, Mississippi, Ch. 561.

[25] *See BNA Daily Labor Report, Special Edition*, Delaware, Ch. 252.

[26] Limitation placed on period in which criminal record would bar unlicensed person from employment in the health care field to the seven year preceding the background check. *See BNA Daily Labor Report, Special Edition*, District of Columbia, Law 14-98.

seek a temporary restraining order to prevent violent acts against employees at the workplace.[27] The Indiana law "covers such actions as following or stalking an employee to or from the workplace; making telephone calls to an employee while at work; and sending written and electronic correspondence to an employee."[28] In Kentucky, the existing anti-stalking law was amended to provide that a restraining order may bar a stalker from entering the place of employment of the victim.[29] Notably, however, as long as the defendant does not have contact with the victim, the right of the defendant to employment and to do business with the employer of the victim must be protected.

Other states enacted laws designed to protect those the employee may contact while working. Hawaii,[30] Oklahoma[31] and South Carolina[32] have all passed laws prohibiting or limiting the employment of sex offenders in certain fields of employment.

In addition to the enactment of laws that either prevent workplace violence or relate indirectly to the prevention of such violence, many states have enacted laws which promote the safety and health of employees generally. These laws may also indirectly relate to the prevention of workplace violence by providing a sense of well-being and peace of mind to employees in the workplace. For example, in Florida, New York and South Dakota, laws were passed to prohibit smoking in the workplace.[33] The trend of states and municipalities in curtailing smoking led the Occupational Health and Safety Administration to withdraw a proposed standard which would have banned smoking in virtually all workplaces.

Further, in response to the recent bioterror threats against the United States, Delaware enacted a law prohibiting the "permanent termination" of an employee as a result of isolation or quarantine brought about by a bioterrorism attack or communicable disease outbreak unless the individual refused to be treated or caused the emergency. *See BNA Daily Labor Report, Special Edition*, Delaware, Ch. 355. Other laws presumably enacted in response to the recent terrorist threats include a South Carolina law permitting employees of wire or electronic communications services to disclose certain communications intercepted in the "normal course" of their employment. *See BNA Daily Labor Report, Special Edition*, South Carolina, Act 339. This law was established under provisions of the new Homeland Security Act and is foreseeably designed to ensure the safety of employees by assisting government agencies in the capture of terrorist individuals. In addition, South Dakota has passed a law requiring all airline employees to carry a state-issued photo identification badge. *See BNA Daily Labor Report, Special Edition*, South Dakota, Ch. 217.

In addition, and though not directly relating to the prevention of violence in the workplace, some states passed laws in 2002, which were apparently designed to ensure the safety of existing and future employees in any setting. For example, three states enacted laws protecting the privacy of personal information of employees. In North Carolina, a new law established an address confidentiality program whereby "employee records of local board of education employees who are victims of domestic violence, sexual offenses, or stalking are not available for inspection and must be redacted from any records released to the public." *See BNA Daily Labor Report, Special Edition*, North Carolina, S.L. 2002-171. In Oklahoma, a new law protects board members, staff, and volunteers of certified domestic violence and sexual abuse programs from having their personal information disclosed as public information. *See id.* at Oklahoma, Ch. 488. The Government Records Access and Management Act of Utah was amended to restrict certain records from public access, such as records which contain social security numbers, marital status, and home address and telephone numbers, in addition to performance evaluations and other personal information such as race, religion, or disabilities.[34] *See id.* at Utah, Ch. 191. As with the

[27] *See BNA Daily Labor Report, Special Edition*, Indiana, P.L. 133 and Tennessee, Ch. 541.

[28] *See BNA Daily Labor Report, Special Edition*, Indiana, P.L. 133

[29] Kentucky, Ch. 119.

[30] Sex offenders are ineligible for employment in the state public library system. *See BNA Daily Labor Report, Special Edition*, Hawaii, Act 87.

[31] "It is unlawful for registered sex offenders to work with children or on school premises, or for business contractors of schools and entities providing services to children to knowingly employ offenders. It is also unlawful for any law enforcement agency to employ as a peace officer or criminal investigator anyone who has been found guilty or pleaded nolo contendere to a sex offense." *See BNA Daily Labor Report, Special Edition*, Oklahoma, Ch. 460.

[32] Registered sex offenders working at institutions of higher learning must provide written notice within ten days of any change in employment or vocational status at a higher education institution in the state." *See BNA Daily Labor Report, Special Edition*, South Carolina, Act 310.

[33] *See BNA Daily Labor Report, Special Edition*, Florida, Amendment 6; South Dakota, Ch. 115 (existing law banning smoking in the workplace amended to define workplace, and to include private residences used for day care); Littler Mendelson Library Bulletin 2002, New York, Int. 256-2002.

[34] The Utah Government Records Access and Management Act as amended opens employee records to the public to the extent that the information is related to the business, such as names, salaries, employment history, job qualifications. It does, however, also restrict access to disciplinary actions that are completed, where the period for appeal has expired, or where the charges were sustained. *See BNA Daily Labor Report, Special Edition*, Utah, Ch. 191.

Minnesota law below, under Utah's law government agencies and their employees are not liable for damages arising from the disclosure of such information except under certain specified circumstances. *See id*.

In addition to the twenty-two states which had drug-testing laws already on the books before the start of 2002,[35] *See The 2002-2003 National Employer*, Ch. 25, §§ 816-833, there was additional legislative activity in this area. Last year, six states either enacted or amended[36] existing drug testing laws permitting, requiring, limiting, or criminalizing the defrauding of, employee drug testing.[37]

The issue of physical safety and protection may not resonate with the concept of trust in the same way that corporate whistleblowing does, but protection of employees is a vivid example of what employers must do to keep the confidence of their employees. Particularly in these difficult times, no company can portray itself as a leader, or one meriting the efforts and devotion of its employees, if it is not prepared to offer them a workplace where they feel physically protected. Again, we are not suggesting that these statutory requirements represent the extent of what an employer should do, but they make clear that society has unmistakably raised the bar in this area.

4. **Workplace Privacy**. In the same sense that many employees view work as a second home, many employees have come to expect the same type of privacy protections at work that they enjoy at home. We routinely find when doing employee training that at least one employee per session will ask questions about the privacy of what she writes on "her" email, meaning the company's electronic system, or says on "his" telephone, provided by the company. The fact is that the dramatically increased concern about terrorism has derailed what had been a significant amount of interest into areas such as email and telephone monitoring, use of Web bugs and cookies and other issues. Moreover, it effectively stopped the momentum which had been building for the proposed Notice of Electronic Monitoring Act, which would have required employers to notify their employees once a year if the employer was engaged in electronic monitoring and to disclose to employees how the fruits of electronic monitoring would be used. Nonetheless, the question of workplace privacy remains a sensitive area.

The USA PATRIOT Act, passed in the wake of September 11, expanded the federal government's power to conduct electronic surveillance of, and investigations into, e-mail and Internet communications. In particular, two provisions curtail employee privacy rights. First, the statute expressly removes voicemail from the protections of the Federal Wiretap Act. While this change was intended to facilitate government access to voicemail, the amendment significantly reduces an employer's exposure for unconsented-to review of an employee's voicemail. Prior to the enactment of the statute, the Ninth Circuit had specifically held that voicemail was a type of communication which could not be retrieved without the consent of one of the parties. The USA PATRIOT Act expressly deleted from the definition of "wire communication" the reference to the "electronic storage" of a wire communication. Consequently, voicemail now is protected only under the Stored Communications Act.

Second, the USA PATRIOT Act permits the Federal Bureau of Investigation to obtain a court-issued subpoena in connection with an investigation into international terrorism, commanding any business (as opposed to limited categories of businesses under prior law) to produce documents, records and other tangible things. Given the nature of these applications, there are no public records concerning the frequency or scope of these subpoenas.

State law developments are not entirely consistent with the federal statute. In Delaware, employers must now notify employees if their use of the Internet, telephones, and e-mail is being monitored. Moreover, in Utah, employers are now protected

[35] Those with drug testing laws are: Alaska, Arizona, Connecticut, Hawaii, Idaho, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Puerto Rico, Rhode Island, Texas, Utah, Vermont. *See* The 2002-2003 National Employer, Ch. 25 §§ 818.1-18.21. There are also some local ordinances in effect: The Berkeley Ordinance, The San Francisco Ordinance, and The Boulder Ordinance. *See id.* at §§ 819-19.3.

[36] In the District of Columbia, the personnel law was amended temporarily to provide for mandatory drug testing of certain workers who serve children. *See BNA Daily Labor Report, Special Edition*, District of Columbia, Law 14-164 and Act 14-310. Kansas amended its existing statute, which allows pre-employment testing for safety-sensitive positions and based on reasonable suspicion of illegal drug use by persons in certain positions, to allow such testing on employees who have access to certain secure facilities, state parole officers, and in mental health institutions. *See BNA Daily Labor Report, Special Edition*, Kansas, Ch. 111. Maine also amended its statute to permit employers to test an applicant's urine or saliva through specified procedures. *See id*. at Maine, Ch. 556. In addition, Vermont made amendments to its law governing drug testing in the workplace to cover such subjects as: requiring federal certification of specimen collectors, prohibition of use of employees as collectors, abolition of exemption for applicants living more than 200 miles away and the requirement that test be part of a comprehensive physical exam, requiring specimen collectors to ensure anonymity of individuals providing samples, and requiring employers to retain medical review officers to review, evaluate, and discuss results with individuals being tested. *See BNA Daily Labor Report, Special Edition*, Vermont, P.A. 92.

[37] Massachusetts' new law requires operators of amusement parks to establish policies prohibiting the use of illegal drugs and alcohol by employees, which may include programs for random testing. *See BNA Daily Labor Report, Special Edition*, Massachusetts, Ch. 44. In Michigan, applications for employment with the corrections department must submit to a controlled substance test. *See id*. at Michigan, P.A. 524. New Jersey made the defrauding of the administration of a drug test, which is a condition of employment or continued employment in certain specified professions, a third-degree crime. *See id*. at New Jersey, Ch. 60. For any non-specified type of employment, it is a fourth-degree crime to defraud the administration of a drug test. *See id*.

from liability if an employee sends an unsolicited commercial e-mail or sexually explicit e-mail, as long as the employer has a published policy forbidding such communications.

The issue of privacy is an enormously sensitive and tricky one for employers. Clearly, they want to create and foster an environment which conveys to employees the sense that they are trusted and will not be spied upon. Certainly, for many employees, the sense that they are being treated as mature, responsible adults who can be counted on to perform their tasks without moment-by-moment checking is an important element of the work atmosphere. However, the imperatives forced on employers by terrorism have forced employers to try to strike a balance between giving employees latitude and protecting them, and society at large, for larger and more dangerous forces.

5. **Increased Protections for Workplace Benefits**. Clearly, the issue of financial confidence is paramount to most employees. Employees understand that economic and market forces can have adverse consequences on any company, particularly in the uncertain economic conditions now prevailing. However, they want to feel that they are not being placed in a position of risk because upper-level management is protecting itself at their expense. In fact, the aspect of the Enron situation which provoked the greatest outcry was the devastation of employee pension plans and loss of benefits while senior managers were protecting their own positions.

Congress, the Department of Labor and the Internal Revenue Service have all responded to this sense of employee betrayal and have done so in very different ways.

Congress acted first, passing the Sarbanes-Oxley Act, which among other things, outlawed certain sales of company stock by executive officers and directors during any period when the rank and file employees are prohibited from selling such stock through the company's 401(k) plan. Retirement plans implement so-called "blackout periods" (at which time sales of stock are often prohibited), on an account of a change in the plan's record keeper or trustee or a change in plan investment options. At first blush, it may appear incongruous and illogical to foreclose the rights of executive officers and directors to sell their company stock just because 401(k) plan participants cannot sell theirs. However, in an era of mistrust, Congress, hearing the anger of constituents at perceived corporate abuses, apparently did not mind using a very broad brush to foreclose the rights of high-ranking corporate players to address the inappropriate actions of a few.

This sense of mistrust also may have been a driver in the Department of Labor's *amicus* brief in the 2002 lawsuit between former Enron employees and Enron and certain officers and directors thereof (Tittle v. Enron Corp., S.D. Texas). In this lawsuit, the DOL asked the Court to hold high level officers of Enron (the CEO and members of the Board of Directors) personally liable for possible breaches of fiduciary conduct (the continued offering of imprudent investments through the retirement plan) committed by those they merely appointed to positions of authority. The theory that the DOL asked the court to adopt is that certain "appointing fiduciaries" could be held liable for the actions of others even if they had no knowledge of the breach themselves. The message that the DOL is sending is clear. Since there is little trust between employers and employees, there should be no trust between the CEO/Board of Directors and those it appoints who are lower on the corporate ladder. In a system without trust, the individuals at the highest levels of a corporation must actively monitor actions which in happier times could have been safely delegated to others.

Another area where the breakdown of trust is of major concern is the area of pension plan "conversions." Since very few companies can now boast of a workforce where employees expect to spend their entire careers, traditional pension plans (under which employees accrue the bulk of the benefits at the end of a long career) are not necessarily the best retirement vehicle. However, companies have been very reluctant to change their plans to better provide for the retirement needs of their workforce because in the current environment, the objections of the relatively few, who may "lose out" when a new plan is implemented, is permitted to stifle new initiatives and management. When a company announces that it is converting its pension plan, there is often an immediate assumption that the conversion is being done for cost control reasons rather than the provision of optimal retirement benefits. The Internal Revenue Service quite recently proposed regulations which would permit conversions from traditional pension plans to cash balance plans. However, after an onslaught of criticism, the Service withdrew the proposed regulations (citing merely that "comments submitted on the proposed . . . regulations have raised serious concerns about their effect on cash balance conversions"). It may now be some time before employers can look to rethink their pension plans to best address the legitimate needs of their current workforce.

6. **The State Legislative Explosion Attempting To Replace Trust With New Laws**. The public breakdown in trust translates into legislative action, especially within State legislatures. As already demonstrated under workplace safety, the number of new laws and restrictions is daunting. This is equally true in several areas, especially those associated with a breakdown in trust. The State Supplements to *The 2003 National Employer* report on many of these changes. Additionally, Littler publishes ASAP's regarding several of the most important legislative developments. Littler also maintains many fifty-state surveys which compare and contrast laws regulating workplace activity from paycheck requirements to whistleblower protections in various industries. Many state whistleblower laws expanded protection for persons in the health care industry, including Alaska, Florida, Maryland, New York, and Nevada. In California, private petrol operators are now barred from discharging, demoting, threatening, or in any manner discriminating against whistleblower employees. Georgia expanded whistleblower protection to public providers of mental health and developmental disabilities services; and in Pennsylvania, sewage treatment plants, waterworks, environmental laboratories may not discharge, threaten or otherwise discriminate against a whistleblower.

To demonstrate the impact of the breakdown of trust, certain laws are examined below. These are not necessarily the most important laws passed in 2002, but they are representative.

■ Mandatory Leave For Victims Of Sexual Assault

In 2002, the California legislature amended the Labor Code to prohibit employers from taking adverse employment action against victims of sexual assault who take time off from work as a result of the assault. (A.B. 2195) This bill cuts both ways on the issue of trust in the workplace. It demonstrates the legislature's general distrust that employers will "do the right thing" and allow victims of sexual assault much needed time away from work to put their lives back together. However, the legislature also turns the tables and recognizes the potential for abuse of this leave by employees. Accordingly, use of this leave is subject to certification through police report, court order or medical documentation.

■ Legislature Mandates Employee Access to Payroll Records.

In 2002, the California legislature passed a bill requiring employers to comply with written or oral requests from employees to inspect or copy payroll records within 21 calendar days of the request. This bill demonstrates not only lack of trust that employers will comply with employee requests to view payroll records, but it evidences lack of trust on a more general level. In passing this bill the legislature is emphasizing the importance of employee access to payroll records so that they may police employers and increase employer accountability. (A.B 2412.)

■ Dram Shop Employees Offered Protection Money Can't Buy.

In 2002, the Missouri legislature passed a bill dictating that a dram shop employee may not be terminated for refusing to sell alcohol to a customer who is visibly intoxicated. (H.B. 1532.) This is a classic example of legislation passed due lack of trust that the employer will encourage socially responsible behavior when it could potentially cut into its profits.

■ Employees Cannot Be Monitored Without Notice.

In 2002, the Delaware legislature passed a bill that prohibits employers from monitoring its employees phone conversations or email without prior written notice. (H.B. 539.) This bill is a direct result of growing skepticism among employers that employees are not using business telephones and computers in appropriate ways. This bill establishes what the Delaware legislature feels are appropriate parameters of employee monitoring, balancing the interests of the employee and the employer.

■ Nurses' Discretion Given Weight By Legislature.

In 2002, the Minnesota legislature passed a law establishing that no adverse action shall be taken against nurses who refuse overtime if they do so to avoid jeopardizing patient safety. (Senate File No. 2463.) Here, the Minnesota legislature is demonstrating greater trust in the ability of nurses to determine when they can safely perform overtime than in the ability of healthcare employers to decide the same.

■ Environmental Laboratory Workers Encouraged To Report Violations Of State Environmental Laws.

In 2002, the Pennsylvania legislature passed a law protecting employees of environmental laboratories who reported perceived violations of state environmental laws. (H.B. 2044.) This legislation demonstrates a generally recognized principal that absent legislation protecting "whistleblowing" employees, employers cannot be trusted not to take adverse action against employees who call to light violations of law and other improprieties engaged in by companies.

■ No Drinking and Riding.

In 2002, the Massachusetts legislature passed a law mandating that Amusement Park employers establish personnel policies prohibiting the use of drug and alcohol by its employees. The Legislature went as far as to permit implementation of policies which use random drug and alcohol testing. (H.B. 3529.) This law illustrates that in positions involving public safety employees are not to be trusted, even if an employer would otherwise be trusting of them.

■ Harsh Civil Penalties For Failure To Report Deaths.

In 2002, the California legislature added a section to the Health and Safety Code which provided for, among other things, a penalty of not less than $5,000 for an employer's failure to report a serious injury or death to the California Division of Health and Safety. (A.B. 2837.) This law demonstrates the California legislature's belief that absent severe consequences, employers cannot be trusted to report serious accidents, even though by doing so they may be preventing future accidents and promoting safe working conditions for their employees.

■ No Mandatory Use of Sick Leave For Jury Duty

In 2002, the Oklahoma legislature passed a law which prevents retaliation against employees for jury duty and imposes a fine of up to $5,000 against employers which force an employee to use sick leave or vacation leave when on jury duty. (Ch. 134.) This law demonstrates the Oklahoma legislature's belief that employers cannot be trusted to respect the civil obligations of its employees without fear of penalty.

Having established the six areas of employment law most impacted by the breakdown in trust, it is necessary to focus on what can be done to improve the situation. Beyond the simple advice of adopting a plan for legal compliance, Littler has worked on several possible solutions. These solutions are not exhaustive, but provide an excellent device for fashioning a strategic response to protecting and rebuilding the status of being a trusted employer. The legal, ethical, and economic rewards for this activity are potentially one of your organization's greatest assets.

Part Two:
REMAKING OF THE TRUSTED EMPLOYER: THE ROAD BACK— SIX PRACTICAL SOLUTIONS FOR ENGINEERING LEGAL COMPLIANCE AND REGAINING EMPLOYEE CONFIDENCE

Reestablishing a trust relationship with employees after the recent and continuing flood of corporate financial scandals, bankruptcies of major companies, and the nation's economic downturn is not an easy task or one which can be accomplished quickly. No magic tricks or slick gimmicks can restore "trusted employer" status in the near term. Legal compliance with the onslaught of new legislation, regulations and federal and state employment laws is daunting and given the developments of the last few years, mere compliance by itself is not enough to change employees' perceptions of their employers. However, although the challenges have created a climate of employee distrust, there is a basis for hope for employers willing to recognize the problem and take affirmative steps to rectify the situation. As the CEO of PriceWaterhouseCoopers, Samuel A. DiPiazza, Jr., states in his recent book, *Building Public Trust*, "Crisis is opportunity." We, as employers, should seize the opportunity to learn the lessons about employee mistrust which have affected our nation and take the steps necessary to regain that trust.

The reason for taking decisive action is as simple as the fundamental reason for business activity—the return on investment. The challenges identified here, borne out by national studies, demonstrate that the majority of employees distrust corporations generally and have diminished confidence in their own employers. The impact of highly publicized legal and ethical violations is causing even the most loyal employees to wonder who they can trust. This is a problem because studies demonstrate that aside from issues of legal exposure and bad public and customer relations, there exists a direct connection between the lack of employee trust and company performance. Low trust and reduced productivity in turn can produce a rise in turnover, cynicism, lack of initiative and a huge increase in litigation costs. It is a self-perpetuating cycle, but one which can be eradicated by organizations which are prepared to acknowledge the problem and take corrective measures, even when they have not been directly implicated in misconduct.

These are the critical reasons why employers in 2003 need to develop and implement strategic solutions to the problem. We all are keenly aware of the high cost of defending lawsuits alleging that an employer has failed to comply with applicable laws, even when the case has no merit. Similarly, the lack of employee trust can have a huge financial price. According to Watson Wyatt's Workforce USA 2002 Survey, the three-year total return to shareholders is almost *three times lower* in companies with low trust levels among employees than in companies with high trust levels. These are numbers that management cannot afford to ignore.

To maintain or regain "trusted employer" status, employers should consider incorporating the following strategic solutions, and view them not just as part of an employment law compliance program, but as a central element of the business plan and central to your company's return on investment. "Those organizations that have high employee engagement, which is driven by trust, have higher revenue growth, lower costs of goods sold, and lower sales and advertisement expenses."[38] The economic benefits gained by investing in legal compliance alone justify an investment in strategic solutions. Addressing the issues of trust and formalizing solutions for regaining employee trust are not only "doing the right thing," but can also generate better business results.

As we examine the following six strategic solutions, we urge employers to consider a 3-level approach:

Level 1—The Foundation—What is legally required to achieve compliance with employment laws?

Level II—The Model—What are the Best Practices? What are the successful leaders in your industry doing to reestablish trust while complying with the law? What strategies really work to effect change?

Level III—The Vision—Unique Solutions. What will best work within your company to respond to the unique issues and visions that your company may have regarding trust and legal compliance?

[38] *Rebuilding Employee Trust* by Shari Caudron, *Workforce*, October 2002.

The guiding principle is that to begin to regain employee trust, companies must go beyond legal compliance and adopt innovative strategies which can recapture and rebuild employee confidence over the long haul. We propose a series of measures designed to restore companies to an improved relationship with their employees and a position of esteem in their industry and the business world generally, with the ultimate goal of driving financial success.

A. Solution One: Redefining Corporate Culture—Focus on New Priorities

To be successful in regaining employee confidence in an age of declining trust and increasing cynicism, a company needs to reexamine and redefine the very essence of its corporate culture. This is a long-term, conscious decision-making process which may often be complicated by events outside the control of your company. Again, there is no magic wand and no universal formula which works for every organization. However, what is clear is that the process must be thorough and must entail an overall examination of the enterprise; a series of piecemeal decisions to address isolated problems will not suffice and is more likely to be seen as window-dressing.

1. **Reestablishing Trust From The Top Down**.

If your company is serious about moving in the right direction to reestablish a social contract of trust with employees, it has to start at the top and declare trust to be a significant corporate priority. Just a little over two weeks ago, in remarks prepared for an awards dinner hosted by the International Financial Law Review, SEC Commissioner Paul S. Atkins stated, "A lesson from the recent corporate failures in America is the importance of corporate culture and what we call the 'tone from the top.' A CEO's tolerance or lack of tolerance of ethical misdeeds and a CEO's philosophy of business conveys a great deal throughout the organization." While words and symbolic gestures alone will not achieve trust, they are a very important starting point. A company serious about addressing this problem must make the commitment to trust an overall internal mission, not merely a knee-jerk reaction to "fix" benefits policies or address safety issues at a specific plant.

2. **The Need For A Code Of Ethics**.

What does an employer need to do to be legally compliant? There is no legal requirement that a corporation establish a "new corporate culture." However, and by way of example, the Sarbanes-Oxley Act, by mandating new legal standards for publicly traded companies, has raised the bar of conduct for non-public companies, and especially those which seek to be viewed as leaders in this regard. Given the extensive requirements of Sarbanes-Oxley, the prevalence of state regulations in this area, and the common law theories which continue to be offered and tested in the courts, it is a distinct risk for a company of virtually any size to not have a code of ethics in place.

Whistleblower lawsuits are one of the most rapidly growing areas of employment litigation. Imagine the potential result—imagine the arguments a plaintiff's lawyer will make to a jury—when a company is sued for anti-whistleblowing retaliation and has no mission statement, no code of ethics, and no code of conduct in place as a definition of its values and the types of behavior it will not tolerate. Following the extensive media coverage of, and negative publicity for, companies such as Enron, Tyco, WorldCom, Global Crossing, and now Royal Ahold and HealthSouth, no company should relish the prospect of standing before a jury without having in place a code of conduct which declares various forms of unethical conduct as contrary to its core principles. By contrast, a current, state-of-the-art policy statement of ethics and procedures can be a valuable first step toward making ethics a reality in your company. Top-level executives, legal counsel and human resources leaders must make it a non-negotiable priority to examine and, where necessary, reinvent corporate culture to make ethics and maintaining employee trust a centerpiece, both to achieve legal compliance and to help financial performance.

3. **Redefining Corporate Priorities**.

To reach this goal, we must ask what the company's redefined priorities actually are? In his provocative book, *Building Public Trust*, Mr. DiPiazza provides an innovative framework to assist in the redefinition of corporate culture. Although his book focuses on the accounting world, the theories apply with equal force in the employment arena. Mr. DiPiazza focuses on the importance of creating a "culture of accountability." This concept is critical, and cannot work without a commitment from the top. Simply put, management must accept the responsibility to live by the words of the "new corporate culture." Corporate leaders must make the necessary adjustments to what Commissioner Atkins called "the tone from the top" and prioritize accountability as a critical part of corporate culture.

Mr. DiPiazza next discusses the critical importance of the "spirit of transparency" as a means of establishing public trust. Again, his model, based on the accounting firm concept, is

fully applicable in the employment context. Employees want information. They need information to be able to make decisions for themselves and feel empowered, whether it concerns their pension plans, safety issues, the viability of the business, or anything else that they deem relevant. Companies must strive to make information available to employees and proclaim transparency as a key part of the new corporate culture.

Studies show that companies which maintain a culture of honesty and integrity, and put those values into action, are more productive and financially successful and tend to command greater respect from employees and the public. Perhaps the best known example was the forthrightness and integrity with which Johnson & Johnson handled the Tylenol tampering crisis of 1982, but it does not take a dilemma of that magnitude to elicit corporate transparency and honesty. However, any such effort must start from the top. The integrity of the leaders themselves is critical and should be supported by unequivocal statements of the corporation's desire to meet or exceed applicable legal standards. Many corporations now feature a code of conduct and/or ethics and these documents vary widely in format and content. Some are one-page statements of basic tenets, intending to provide overarching principles to guide employees in their dealings with each other, with customers, regulators, and with anyone else with whom they come into contact by virtue of their employment. Others are long, formal and detailed, and contain specific guidance on a wide range of issues.

We believe that there are a few fundamental rules for successful establishment and implementation of any such code. First, unless it has the commitment of executives at the highest level of the company, it will be ignored. Upper management must be directly and visibly involved in the creation and updating of any code of ethics.

Second, and by the same token, the code must be the product of a collaborative effort within the company. Different segments of any organizations-legal, regulatory, human resources, external affairs, customer relations and others-have different and equally valid perspectives on the organization and its needs, strengths and weaknesses. If the code is ultimately to have any value, it must reflect the contribution of a wide range of viewpoints within the company.

Third, encouraging employees to come forth and report complaints must be an essential component of the code and indeed of a reexamined corporate culture. The announcement of the company's values has no real value, and will be so treated, if employees do not feel free to come forward when they see that those standards are not being met. No company wanting to be seen as trustworthy can afford to ignore the steps necessary to foster this climate.

4. **Destroying The "Tattler" Stereotype As Part Of Creating A New Corporate Culture**.

Companies must reexamine how their culture addresses the "tattler" stereotype and this issue provides a vivid example of the choice that a company has in going beyond mere compliance. The fear of retaliation, of being fired, or ostracism for being labeled a "rat," has created a culture in which complaints about conduct at work were strongly discouraged. Indeed, the patchwork of state and federal whistleblower laws that exist give widely varying levels of protection, and sometimes no protection at all, to employees who came forward with their concerns. However, companies seeking to go beyond what the law requires have implemented anti-retaliation policies for those courageous enough to step forward, and such policies are a first step toward addressing these fears. The development of federal and state laws protecting those who complain, and penalizing employers who retaliate against persons who come forward, make it necessary for employers to examine and redefine their corporate culture regarding individuals who report wrongdoing.

The media has certainly assisted in bolstering this trend by lionizing whistleblowers, most vividly demonstrated by Time Magazine's designating as 2002's "Person of the Year" the women who spoke out at WorldCom, Enron and the FBI. Of course, this does not mean that every employee who comes forward is pure of heart and motive. Just as with discrimination claims, there will always be employees who see fraud or cover-up at every turn, or as a convenient excuse for their own poor performance or bad reviews, and will try to appropriate the whistleblower's mantle to protect their job or obtain an undeserved financial settlement. This is why an active, well-run and internally respected human resources department, supported by inside and/or outside counsel, is critical. Bad claims need to be weeded out quickly and good claims need to be dealt with just as quickly. A problem which is allowed to fester, or even worse, a sense that something is being covered up, is corrosive and potentially fatal to any sense of employee trust.

To the contrary, on a "corporate culture" level, the company must accept the notion that reporting of problems by employ-

ees is a positive sign. Employees, who do not care about their company, its performance or its future, or their role in it, will rarely come forward. Instead, they will ignore problems, or even worse, try to figure out ways to beat the system themselves. Employees who care enough to take the time and effort to come forward, and expose themselves to what many will perceive as a career risk by reporting improper conduct, are a core constituency in a company and need to be nurtured, not treated dismissively.

5. **A Practical Tool For Changing Managers' Views On The Role And Value Of "Whistleblowers."**

It is not easy to change the way the organization looks at an employee who reports misconduct. Many of these employees are not sincere and find this a convenient cover for their weak performance. However, how can the organization change the way we see someone who provided the valuable service of exposing prohibited conduct such that it can be addressed. Consider the use of this example as a learning device for managers:

Mrs. M. worked as a nurse in a local hospital. She did not have the best relationship with the hospital management. In late March 2003, her husband, a 32-year-old attorney, came to the hospital to pick her up and was distracted by the way one of the patients was being treated. He observed the extremely sick patient lying in a bed bandaged and with a white blanket. He then noticed that the attendant was handling her in a very unprofessional manner. Mr. M. decided to do something about it. Although he practiced law, he did not consider filing a lawsuit. Only briefly did he consider reporting the situation to the hospital management, and then he decided this would be futile. Mr. M. went to the bedside of the woman patient and said "Don't worry, don't worry." He and his wife then decided they would become whistleblowers. It never crossed their minds that this decision could be worth a great deal of money to them or support a claim under the Fraudulent Claims Act. Instead, they reported the situation to government authorities. Both Mr. M. and his wife were interviewed several times and even asked to go back to the hospital and get more information. Finally, the government authorities determined the complaints to be credible and they sent in a team to assess the situation and transfer the patent to another hospital. Severe sanctions were taken against those in the hospital who were responsible.

Clearly there was a total breakdown of trust in this workplace. How do we feel about Mr. and Mrs. M? Were they good citizens or traitors? Why did they not go to the hospital management? Mrs. M had been told repeatedly if there was a problem at the hospital she could bring it to management. There were dozens of other employees and even law enforcement officials who had seen the same conditions in the hospital, yet they did nothing. What is necessary to distinguish between an act of treason (being a tattletale) and one of heroism?

The answer is found in the core values of the institutions involved and in the society as a whole. Some of these values are so strong that they transcend nationalities, religions, and national boarders. Now for the rest of the story. The husband in our very real story is Mohammed and the woman he saw being abused was in a hospital in Iraq. She was a 19-year-old soldier, Jessica Lynch. The government authorities were the U.S. Marines and their extraction team was made up of Special Forces. In our culture and with our values, Mohammed and his wife acted with uncommon courage and recognition of some of the most basic and important human values. Mohammed gave up the life he knew for someone he barely knew; yet he expressed no doubts about his decision. "She would not have lived," he said simply. "It was very important." (Story based on *Washington Post* reporter Peter Baker's article reprinted in the April 4, 2003 *San Francisco Chronicle*, W7.)

We may not think of this behavior as whistleblowing, although it is a vivid example of precisely that type of behavior. On a human level, we overwhelmingly identify with the values being expressed, but it is worth asking how many of us in identical circumstances would have risked our lives and the lives of our family members to redress this wrong. If a set of deeply held values is truly honored in one's workplace, would we not want an employee observing potentially criminal conduct to report it?

Why has it taken so long for employers to have a similar recognition of those who decide to become whistleblowers? The answer is not the lack of core values or a disregard of their importance. It most likely comes from a learned skepticism of the real motives of those who report misconduct. The reports are normally offensive and often come from those who have lost their personal credibility in the workplace. It is not uncommon in these cases to see a poor performer, perhaps one who is nearing termination, suddenly to have an epiphany and risk becoming a "martyr for truth." It is often easy to believe that the marginal employee was coached by counsel to report sexual harassment or fraud in the shipping department as a means of being placed in a legally protected

category and charging that any discipline thereafter resulted from the complaint rather than the poor performance.

6. **Visionary Concepts**. As Mr. DiPiazza pointed out, a company can aspire to any of three levels of activity insofar as corporate ethics go. In the accounting firm context, the first is generally accepted accounting principles, the corporate law equivalent of doing what you have to do but no more. Obviously, by meeting the accounting standards, the accounting firm will probably be immune from criticism or lawsuits, but will also probably never be a source of inspiration to its employees, clients or the industry. Employers outside regulated fields such as accounting or law are very much the same. It is possible for a company to decide that, in its tenor and dealings with employees, it will do everything it needs to do, no more or no less. This is, of course, a legitimate choice and a company doing so will find itself generally above criticism, but it will have great difficulty motivating employees to do more, be productive, or otherwise give the extra effort that will separate it from the competition.

The second level that DiPiazza proposes is that of specific industry standards. A company in this tier looks to what others in the same field are doing and models itself accordingly, even if that requires greater effort, disclosure or detail in reporting than legal requirements. Similarly, non-regulated companies may decide that they should find and model themselves after comparators, whether from the same industry, from companies of similar size or sales volume, or the same geographic region. Leaders of companies which follow this path undertake an extra effort and expect more from their employees, but by the same token, make known that they expect more of themselves and can legitimately hope that their efforts will meet with tangible rewards.

The final level of company behavior described by Mr. DiPiazza is "best practices," in which companies strive to be the leaders that other firms imitate. Companies in this category accept a higher burden and, in truth, the benefits may not always be easy to see or quantify. For example, companies with proactive human resources departments and advanced employee practices are less likely to be sued, but it is difficult to attach a financial value to the lawsuit which is never brought.

Thus, the decision of the type of corporate culture a company wants to pursue and develop entails a certain amount of strategy and soul-searching, and even a measure of faith. Mr. DiPiazza's book suggests a useful method for attempting to quantify these "soft" gains, but it is clear that no hard and fast formula has been developed in this regard. However, as the Watson Wyatt survey confirms, there is a connection between the level of corporate behavior, and both employee trust and the financial performance of the company. The type of culture that a company decides to develop, and where it sees itself in the DiPiazza three-tier system, will help determine its practices and the type of relationship it will nurture with its employees.

B. Solution Two: The Critical Link-Building More Effective Communication Processes

From all levels and from every angle, effective communication in any company is the critical link for regaining employee trust. "Communication drives trust."[39] From a solutions standpoint, your company can have the most perfect corporate culture statement or intent, but it becomes worthless if it is not effectively communicated to your employees. Almost every new piece of legislative action identified in this paper, and discussed throughout this conference, whether dealing with whistleblower protection, privacy protections, safety and antiviolence protections, retaliation, benefits or everything else, mandates effective communication and disclosure strategies. The critical link in rebuilding trust relationships is "effective communication."

This sounds almost stereotypically easy. However, and surprisingly, communication is in many ways the biggest challenge facing employers today. Employees want information and can see through efforts to "spin" information, company policy, bad financial news and the rest. According to the Watson Wyatt survey, companies with high levels of trust communicate both good and bad news and do so effectively. High-trust companies spend time and effort to learn how best to communicate information.

1. **Level I-Foundation: What is legally required to be communicated?**

Many of the new laws and legislature require "communication" to employees, raising communication to employees from a fuzzy, feel-good concept to a legal requirement.

a. *Sarbanes-Oxley*. This legislation was designed primarily to address accounting practices and corporate disclosure, but has significant impact on employment and human resources issues. Section 301 of Sarbanes-Oxley requires that employees of public companies be notified that they have a right to bring to the attention of the company's audit committee any complaints regarding accounting, internal accounting

[39] *Rebuilding Employee Trust* by Shari Caudron, Workforce Magazine.

controls or auditing matters. Most manuals state generally that employees' questions about company rules or policies, or complaints about violations of the company's rules, may be discussed with management. However, we recommend that the handbook specifically designate "questions or complaints regarding accounting, internal accounting control or auditing matters" as issues that can be raised to the audit committee of publicly traded companies, or to the Chief Financial Officer of privately held firms, as well as to the designated human resources officer to whom claims of discrimination, harassment and the like would be raised.

Sarbanes-Oxley also requires that a public company's audit committee establish procedures by which employees of publicly held firms can submit to the audit committee confidential, anonymous submissions of concerns regarding questionable accounting or auditing matters. We believe that the policy should state explicitly that employees can bring such matters to the audit committee, either identifying themselves as the source of the concern or complaint, or anonymously and confidentially, and that their submission will be treated seriously regardless of the manner of submission. It is also important that the policy state that all such submissions will be promptly and thoroughly investigated, that the company will take corrective action as it deems necessary, that employees are required to cooperate in any such investigation, and that this protection is available only to employees who make complaints honestly and in good faith. Assuming that the company has similar provisions covering the treatment of discrimination and harassment claims, it should not be difficult either (a) to incorporate financial whistleblowing into the appropriate sections; or (b) to write a new section on this topic specifically for financial whistleblowing. The more clearly written the company's policy is in this regard, the more it demonstrates a commitment and aspiration to being more than a "legal compliance" company, but rather an "industry standard" or "best practices" enterprise.

Section 806 of Sarbanes-Oxley prohibits retaliation against whistleblowers, and specifically prohibits discharge, demotion, suspension, threats, harassment or any other type of discrimination against an employee who engages in this type of conduct. Section 1107 expands on this prohibition by noting that anyone who knowingly interferes with the lawful employment of any person because that person reported the actual or possible commission of any federal offense to law enforcement official is subject to a fine and/or incarceration. Policies should contain a provision such as:

Retaliation against any employee as a result of his or her bringing forward, in good faith, any questions, concerns or complaints about accounting or auditing matters, recording of information, record retention, or any other activity in any way concerning the honesty and integrity of the company's operations is strictly prohibited. Similarly, retaliation is prohibited against any employee who provides accurate information to any law enforcement agency about the actual or possible commission of any federal offense by the company or by any of its employees. Any employee who feels that he or she has been retaliated against or threatened with retaliation for these reasons should report the matter immediately to senior managers or, if it concerns questionable accounting or auditing matters, to the audit committee, either as a signed complaint or on an anonymous, confidential basis. All such complaints will be promptly and thoroughly investigated and the company reserves the right to take corrective and disciplinary action as it deems fit, which may include suspension or dismissal of any employee found to have engaged in or threatening to engage in retaliation.

Advising employees that they can come forward to the audit committee for retaliation claims is not required by Sarbanes-Oxley, but again, it signifies a commitment to going beyond legal requirements. We recognize that these policies run the risk of increasing the number of complaints and placing an additional and perhaps significant load on the human resources department and/or the audit committee. Our surmise is that what may be an initial burst of activity will not continue, particularly as employees come to understand that the system is open to their concerns.

b. *HIPAA* The new Health Insurance Portability and Accountability Act ("HIPAA") provides privacy protections for health information. Communication requirements lie at the core of HIPAA compliance. HIPAA mandates all health plans and healthcare providers do the following:

- Establish privacy policies;
- Limit the use and disclosure of Protected Health Information;
- Establish a complaint mechanism; and
- Notice and description of concerned entity's use and disclosure protection.

And while HIPAA is aimed primarily at health care providers and insurers, it also significantly impacts any employer that administers health benefits. *See The National Employer* § 125, § 423, § 423.3, § 77, § 119.1 and § 229.4 for more detail.

c. *Workplace Safety and Violence Prevention*. Similarly, new rules concerning the physical protection of employees, as fundamental an aspect of the element of trust as can be imagined, place communication and disclosure in a central position. OSHA requires employers to understand safety hazards and to communicate information about these hazards to their employees. OSHA also contains specific training requirements. *See The National Employer*, Chapter § 27 for specific detail. Of course, how fully and how clearly employers make the required disclosures is a signal of their honesty to the employees, and as a result, these requirements should be viewed not merely as a duty, but as an opportunity for employers to establish themselves as straightforward and honest, particularly when dealing with sensitive subjects.

With regard to workplace violence protection, at least 26 states have passed new laws concerning criminal background checks of employees and prospective employees. In this regard, employers must be aware of their specific compliance requirements, which often vary from state to state and by industry. Employers aspiring to the mere compliance level will implement these rules, as they must, but employers holding themselves to a higher standard may want to consider proactive statements to the existing workforce and explain the new steps and how it will enable them to provide a safer workplace. These rules are discussed in Chapter § 29 of the Employer. Employers need to be aware of the communication and disclosure requirements of the Fair Credit Reporting Act ("FCRA") that often apply.

d. *Benefits Protection*. Here, too, employers face new requirements and the obligation to alert employees to the changes imposed by law. For example, and in a clear effort to reduce the chances that employee pension accounts are not decimated in the same manner as was seen in the Enron debacle, Sarbanes-Oxley mandates that any public company with a pension plan must communicate to its employees before imposing any blackout periods during which plan participants cannot sell shares. Specifically, participants must be given at least thirty days advance notice of blackout periods which affect at least half of a public company's plan participants for more than three consecutive business days. In addition, all executive officers must be required to comply with the same blackout period with respect to company stock they hold outside the pension plan.

To establish a sense of trust and fairness, employers must explain these new rules to employees in plain English. It is hardly a secret that pension plan documents are technical, dry, and often mind-numbingly difficult to understand, a condition caused by both the statute and regulations governing the plans. It is of utmost importance that employees understand these new rules and how they affect them, how they affect members of senior management, and how they will prevent granting a perceived advantage to management. If the changes are clearly explained, it will go a long way to making employees see that they and management are linked in terms of how the plan runs and whatever investment risks may exist. By contrast, absent a plain English document, these changes will seem like another opaque document from the corporate benefits group designed to fulfill legal requirements and conceal what many suspect is the manner in which upper echelon employees are using the system to their advantage.

In addition, if events or actions of the company affect management compensation, those too should be made clear and available to all employees. For example, Sarbanes-Oxley mandates that in certain circumstances, when companies are forced to restate earnings, the CEO and CFO must forfeit or actually return bonus compensation received from the company. Even though such revelations may be embarrassing, employees need to know that the law is being enforced, that senior management is not immune from consequences and again, that they are not the only ones harmed by financial downturns or misconduct.

Not only is it important for the employer to communicate policies to employees, it is essential that employees have a way to communicate with employers and receive reliable and clear information about the company. Just as it is important for employees to have a process by which to complain regarding harassment and discrimination, employees must also have the same vehicle to complain about perceived retaliation and whistleblowing or raise concerns about subjects they deem to be important.

Companies should consider communication tools such as training, meetings and online tools, even personal accessibility of upper management, which create an atmosphere in which employees feel comfortable stepping forward. Hotlines have been successful in many companies, but it is essential that complaints are followed up on to avoid liability.

2. **Level II-Taking the Next Step: Will mere legal compliance on communication procedures work to instill trust?**

Communication involves more than spreading the news via written policy. If we accept the premise that communication is a prime driver of trust and a productive environment is driven by effective communication, the question becomes: "What can a company do to achieve effective communication?"

Consider the following as a means to reestablish more effective communication:

a. *Create a "real" open door policy.* Most companies claim to have open door policies, but how many doors of managers are really open? Consider ways to improve upon this essential step to allow employees a place to ask questions, obtain information and make complaints, if necessary.

b. *Develop more effective complaint procedures.* The establishment of complaint procedures is key to many of the new laws and regulations. However, in order for complaint procedures to be effective, employees must believe that they are safe if they complain and will not suffer retaliation in any way.

c. *Spread information and do so frequently.* In today's Internet age, employees demand, crave and expect information. Information is the norm and critically, is more easily accessible than ever before. If you, as the employer, attempt to hide information or present it in a sugar-coated or opaque manner, there is a very good chance that an enterprising employee will find an Internet-aided manner to find it, only fueling the suspicion that management has something to hide. Companies should provide a high level of transparency so employees are no longer left in the dark. Surveys reveal that high-trust companies are communicators and freely disseminate good news and bad news with equal levels of candor.

d. *Advertise to employees the efforts your company is taking to be legally compliant and effect changes.* Do not rely on the rumor mill to be the conduit of information about steps you are taking in any important area of company activity. Take ownership of the measures being implemented and let them be known.

3. **Level III-Visionary Concepts**

At this level, the employer needs to invent a way of building trust through a communication process that is unique to itself and its culture. One of the best ways of understanding the potential power of this tool is to examine some successful efforts from the past. When Chrysler was nearing insolvency, its CEO, Lee Iacocca, became famous for accepting only one dollar in compensation until the company turned a profit. This communicated a message that top management was totally committed to success and was willing to bet its entire compensation on the outcome. Johnson & Johnson is focused on its core values and communicates them through its famous Credo (http://www.jnj.com/our_company/our_credo/index.htm). Almost every part of the Company internalizes these values and uses them in communicating and making daily decisions.

Today, organizations have even more ways of individualizing and branding their communications. Some possible innovative approaches include: (a) customizing an on-line training program regarding total workplace compliance, including employment laws and legal ethics; (b) using the company intranet as a way of encouraging employee communication and involvement; (c) showing concern for what is important to employees, such as a child-care center with a nanny-cam allowing employees to check on their children throughout the day;[40] (d) communicating community concern with a program allowing employees to take leaves of absence to perform public service; and (e) using the power of the Internet to announce and educate on new policies (see Cyber-Policy from Employment Law Learning Technologies (ELT) as an example of how to introduce a unique electronic usage policy while providing basic training on how the policies works). The list is only limited by the corporate imagination and a careful analysis of return on investment from the undertaking. The bottom line is that protecting and restoring trust in the workplace is good for business economically as well as morally.

C. Solution Three: Making Real Changes—Avoid Superficial Efforts

Newly enacted legislation and regulations require an overwhelming number of procedures that a company must take just to be in "legal compliance." Human resources professionals and legal counsel face an enormous task trying to absorb, understand and implement the requirements of Sarbanes-Oxley, OSHA, HIPAA, OFCCP, PWBA, EEOC, FCRA and others. (See Chapters 5, 9, 10, 11, 18, 24, 25, 27 and 28 for legal requirements of new legislation.) But the real question remains, is implementing these legally required procedures truly enough to effect change and rebuild trust in this cynical environment?

The obvious answer, at least to us, is that it is not. This is your challenge as employers. The minimum amount of required change, covered up in nice language is not going to convince employees, even those inclined to give a company the benefit of the doubt. Actions speak louder than words.

> Consider the following language from the ethics code of a major corporation:
> Employees . . . are charged with conducting their business affairs in accordance with the highest ethi-

[40] This is a current program Cisco Systems, Inc. and a few other high tech employers.

> cal standards. An employee shall not conduct himself or herself in a manner which directly or indirectly would be detrimental to the best interest of the company or in a manner which would bring the employee financial gain separately derived as a direct consequence of his or her employment with the company. Moral as well as legal obligations must be fulfilled, promptly, and in a manner which would reflect positively on the company's name.

This is powerful language, and represents a standard that any company would be proud to adopt and have its employees follow. By imposing this criterion for behavior on itself, this company willingly sought to achieve a high level of corporate ethics and announced to its employees that it expected them to do likewise. It also placed itself in a degree of risk in that it knew, or should have known, that failure by senior management to live up to this standard would harm trust levels within with the company and generate a substantial amount of distrust and skepticism. And, despite the risks, the company elected to proceed with the statement as part of its guiding philosophy.

Which company was it?

Enron.

This is a colorful example illustrating that words are simply not enough. To reestablish trust, the employer must "walk the talk." How does a company implement change while trying to establish employee trust?

Companies must recognize at this juncture that employee distrust stems not just from such obvious corporate misbehavior as fraud and misappropriation of funds, but it grows from less obvious behavior, such as saying one thing and doing another, forgetting promises, generating confusion or being less than candid about market forces and how they affect the company's business prospects, both in the near and long-term. Superficial efforts to regain trust will not work and if anything, are likely to backfire. Having a fancy company picnic or putting together a slick new code of ethics without an action plan is sure disaster. Employees want to see change.

So how do employers "take real action?"

1. **Hold employees accountable, starting from the top**. This is the core principle of Sarbanes-Oxley and the reason it passed with virtually no opposition in either house of Congress. Mere legal compliance will not be the best approach and will be seen as on effort to avoid as many legal responsibilities as possible. High-trust companies not only reward high performers, but also hold poor performers accountable. On March 7, 2003, The New York Times reported that two high-level, high-producing investment bankers were dismissed by Goldman Sachs shortly after an incident in which each of them engaged in conduct which, from the available descriptions, was inappropriate and insensitive at best, and constituted sexual harassment at worst. The financial services industry has stereotypically been seen as too tolerant of such types of behavior. At least in this incident, Goldman acted to send a very different message, one which is much more likely to resonate with its employees than a press release or public apology.

2. **Follow through with commitments**. When complaints are brought to the attention of management, they must be investigated and acted on. Thorough investigations are critical. Importantly a "real" investigation will send the message to employees that the company stands behind its commitment to take complaints seriously. Whether it is a complaint of dishonest behavior, harassment, or a health hazard, the company must stand behind its policies.

3. **Go beyond checking the boxes**. It is surely overwhelming for a company to have to learn and incorporate all the new procedures and standards mandated by Sarbanes-Oxley, HIPAA, and the like. However, in order to make real changes, companies need to stand behind these procedures, explain them to employees, and enforce them or there will be no rebuilding of trust. No matter how perfect the anti-whistleblower policy is, if there is then retaliation, the trust is breached. It is critical to establish early warning mechanisms to prevent retaliation and avoid liability and destruction of trust. Simply announcing the "new policy" is not enough. Spend the upfront time training employees on the details of the new changes. Expand the effort to make employees comfortable by providing them the time to ask questions.

4. **Demonstrate the company's integrity**. When a new code of ethics is announced or a new policy is provided, advise employees how the company intends to stand behind it and then do so.

5. **Prepare a policy and have a meeting letting employees know how it will work and that both they and the company will be accountable**. When a situation arises where the company "does the right thing" in lieu of the easy way out or the cheapest way, let employees know about it.

D. Solution Four: Invest In Legal Compliance and Beyond.

Sarbanes-Oxley, HIPAA, OSHA, other federal regulations and state laws have created an overwhelming number of requirements employers must implement in order to be in legal compliance. Some of these statutes include mandatory audits.[41] Several states require manager training in a variety of workplace issues, such as anti-harassment, safety, anti-discrimination and affirmative action and disability.[42] Federal regulations, case law and state law mandate the written dissemination of information regarding employees' rights,[43] including the disclosure of procedures whereby employees can register complaints.[44]

These mandatory procedures appear to require the imposition of corporate ethics from above, a step which may make the company appear legally obedient, but nothing more. We propose that to make change effectively, employers should consider going beyond a "checking the boxes" mentality and participate in efforts to change behavior and regain employee confidence. This effort involves demonstrating a commitment not only to follow the law but also to address employee concerns, disseminate information, outline roles and responsibilities and other innovative practices. There is no better time than the present for corporate investment of time, energy and funds towards proactive programs. Organizations which have made the effort have witnessed results.[45]

A fundamental element of rebuilding trust is providing information. Another building block is outlining the rules for employees so that employees understand what the rules are and what responsibilities they bear in ensuring company compliance with those policies and rules. In an effort to rebuild trust, think about creating or revamping policies for employees which (a) address their concerns, and (b) provide adequate notice for employees about the rules.

For example, a high priority concern of employees in recent years has been safety. OSHA has specific standards outlining when information about safety hazards in the workplace must be distributed to employees, but consider policies that go beyond the OSHA requirements. For example:

(a) Implement and communicate strategies for emergency response, including terrorist attacks.

(b) Implement and draft policies regarding cell phones, instructing employees not to use cell phones while driving.

(c) Implement and communicate policy background checks being used for new and prospective employees. Employees need to have the security of knowing that people around them have been checked to some meaningful degree and are likely to appreciate efforts in that regard. Although many states require certain levels of background checks for people hired in certain positions in which trust or safety is a concerned, companies should consider going beyond those required levels. The background checks need not be extensive; for example, even a rule that two references for each prospective employee will be verified is worth considering. This, and other steps, will help inform employees that the company is trying to ensure that it is screening out potentially dangerous employees.

Employees also want to know the rules of the game before it is played. What are the standards of conduct for which they will be held accountable? High-trust companies give this information to employees up front. High-trust companies do a good job of communicating the company's business goals and objectives and explaining to employees their role in this effort. Communicating clear policies on as email and Internet use, non-solicitation and confidentiality of company information can help foster trust by making the company's expectation clear.

1. **Show Employees The Big Picture**. High-trust companies do a good job of communicating the company's business objectives and explaining to employees their role in achieving them. The goal is to achieve maximum "transparency" of how the individual contributes to the whole. By demonstrating that the company trusts its employees to "do the right thing" when shown the big picture, increased employee trust in the company is fostered in return.

2. **Implement Quality Training Program-Beyond Just "the Basics."** As noted above, organizations which have chosen to implement strong comprehensive training programs have reaped the benefits, both in decreased litigation and actually changing behavior. Many states have created minimum requirements for training programs in the area of safety,

[41] *See* Employer Chap. 27.

[42] *See* Employer Chap. 15 § 346.

[43] Examples of legally required policies are employees' rights according to Sarbanes-Oxley, HIPAA requires policies regarding employees' right to privacy. State and Federal case law virtually mandates anti-harassment policies. FMLA requires notice to employees.

[44] Sarbanes-Oxley, EEOC guidelines, discrimination and harassment state and federal law.

[45] *See* Employer Chap. 15, § 338, pg. 792, noting that after implementing a comprehensive employment law training program the State of Washington realized a 37% decrease in employment litigation saving Washington State an estimated $2 million per year.

anti-harassment and equal opportunity. However, companies which are committed to the elimination of harassment and discrimination from the workplace go beyond the basic mandated program of anti-harassment and commit to implementing quality training programs. These programs can be in the form of live training, online training and web-based training. Companies should take careful effort in seeking quality training materials and quality trainers. There are dozens of new laws and companies need to ensure that their executives, managers and employees know what the laws are and how to comply with them. There is a huge opportunity here. Educate managers on the nuts and bolts of the new laws in order that: (a) they know how to be legally compliant; (b) you begin to take 'real' action regarding implementing the lessons and procedures of the new regulations (and the old ones); and (c) quality training not only prevents bad acts from occurring in the workplace but helps limit liability in many different areas.

In the area of whistleblower protection for employees of publicly traded companies, the Sarbanes-Oxley Act imposes *criminal penalties* for action which used to be considered merely "lack of oversight." The far-reaching scope of this law is emphasized in the fact that it not only covers publicly traded companies but also their officers, employees, contractors, subcontractors and agents. The language would appear to leave officers and employees open to liability in their individual capacities. In addition, Sarbanes-Oxley seems to create a claim against companies or organizations which do business with publicly traded companies. Sarbanes-Oxley and the new focus on ethics create an opportunity and responsibility for companies to trains their executives, human resources professionals, and managers on how to understand and comply with these increased responsibilities. Given the criminal penalties that may be levied for violating Sarbanes-Oxley, this type of training should be a priority for your organization.

There is no greater link to trust than the right to privacy in the workplace. This issue is complex and complicated. Education in the area of what constitutes company property, and what constitutes a violation of HIPAA and other privacy issues, is an area in which employees can and should be trained. HIPAA, for example, creates a minimum duty to train employees who have access to benefit-related health information. Companies will reap significant benefits if they spend the time and effort to help employees understand these concepts.

The new laws such as Sarbanes-Oxley and HIPAA, and the new focus on ethics, create a new role for training as executives, human resources professionals, and managers struggle with increased responsibilities. Given the criminal penalties that may be levied for violating Sarbanes-Oxley, such training is urgently needed.

3. **Conduct Audits to Gather Critical Information**. There are audits that are mandated by such statutes as OSHA, but there is no better way to obtain information and find out what is happening in the workplace than to conduct a general employment practices audit.

An important area to audit is wage and hour issues. A multitude of class actions throughout the country has focused increasing attention on overtime and exempt/non-exempt status. It is extremely prudent for the employer to conduct audits in this area to find out how people are being classified and correct the problems before they turn into a class action lawsuit. In the longer term, employers' current difficulties in maintaining compliance in this area may be lessened by the US Department of Labor's proposal last month to make the first across-the-board changes in decades in the definitions of overtime-exempt employees under the federal Fair Labor Standard Act. Even if this proposal is adopted, however, we expect the existence of inconsistent state standards will continue to drive overtime litigation for years to come.

Think about conducting privacy audits to determine what information is being examined. Particularly for companies not large enough to warrant a full-time privacy officer or department, it is good practice to determine what information is being collected on employees and who has access to that information and for what purposes. In light of legislative changes in this area, and the changes in technology that many companies seem to implement on an almost constant basis, and for multi-nationals, the impact of the European Union's Privacy Directive, we view it as sensible to stop and take stock of your information flow and privacy protections so you can make sure that you as a company know whether new steps or policies need to be implemented.

4. **Seek Employee Input**. There are no regulations that mandate that employers participate in employee surveys or receive employee input. However, a critical building block in the road back to trust includes seeking employee input to identify employee concerns. In the area of safety, for instance, employees have grave concerns about recent publicized health hazards such as SARS and may want to know what the employer is going to do about it. Developing strategies to obtain employee input is critical in the road back to trust.

5. **Addressing Safety Concerns-A Priority**. Employees want to be able to trust that when they come to work they will be safe and employers should make this a top priority, recognizing that no guarantees exist against society's troubles and violence. Beyond having a policy for safety, other features such as safety audits should be considered and emergency response mechanisms should not be ignored. Some companies are putting out pamphlets regarding emergency response and including responses for terrorist attacks and other violent activities. In this area, crisis management planning is key and involves analyzing the risks to your organization, in order to identify measures that will help enhance safety and minimize risk to your employees. In this area, like in the area of privacy, ongoing monitoring, and regular reviews and testing of plans constitute the best, indeed the only, way to ensure that your planned procedures are working well. Going beyond legal compliance can go a long way to building trust with employees. Whatever the unique plans and strategies of your company will be, they should be disseminated to employees so that they understand what the company is doing in order to merit their confidence.

6. **Enforce the "Zero Tolerance" of Retaliation**. Given the current environment of lost trust, there can be no better time for investment of time, energy and funds towards proactive measures to assure employees your anti-retaliation policies mean what they say. Update your policy if necessary. Companies need to make clear that employees who bring issues forward will be safe from retaliatory steps by superiors who feel threatened by what they perceive as criticism. Employees lose trust when they "try to do the right thing" and then are punished or disciplined for it. Retaliation protection under federal and state law, just like whistleblower retaliation protections, must be a high company priority. A well-written policy on retaliation is simply not enough. You need to be proactive and the return on investment can be huge. Going beyond the basics can and will save you a lot of time and money in the future. Most importantly, send the message from the top that it will be enforced.

(a) Have a well-written policy and a complaint procedure that encourages persons to come forth with complaints of acts they perceive to be retaliatory.
(b) Provide training to both managers and employees providing information on how to understand retaliation, the complaint process and what the penalties are if it occurs.
(c) Hold wrongdoers accountable.
(d) Put early warning systems into place-know when protected activity occurs and attempt to preempt any retaliatory actions. This means warning those involved that they must do or not do to avoid even the perception of retaliation.
(e) Make certain that independent thorough investigations are conducted.

E. Solution Five: Create a Revitalized Role for Human Resource Professionals-The Liaison for Rebuilding Trust.

Human resource professionals may not be the ones setting the tone for corporate behavior and integrity, but they can be critical liaisons between management and employees and a key component in the rebuilding of trust. Obviously, no human resources department, no matter how skilled, can overcome the corrosive effect of management, which is, or is perceived as, insincere or otherwise unworthy of employee confidence. However, if top management is committed to a corporate culture of integrity and is prepared to support the human resources professionals and the skills they bring to this endeavor, then it has a powerful tool and ally in the effort to rebuild trust.

Results of surveys demonstrate that in companies where human resource professionals are effective, a state of affairs, which can occur only, where upper level management is prepared to heed its advice on employee relations, employees tend to believe the company is trustworthy. In revitalizing the human resources function as part of a program of meeting or exceeding legal requirements and rebuilding trust, companies should consider the following:

1. **Implement Legal Compliance**. The foundation of the human resource role is to assist in implementing the policies and procedures established by state and federal law and regulations, and sometimes international codes, such as the European Union's Privacy Directive. This task can be tedious and demanding, since there are many procedures that must be put into place or refined or revised, as the legal framework shifts. However, this responsibility is a key link in the trust relationship-by communicating these changes clearly and openly, companies can signal their intention to follow or exceed all of the appropriate laws.

2. **Own the Task of Achieving the Effective Communication Process**. Open communication is probably in every American company's handbook, but is one of the most difficult concepts to implement. For human resources more than any other department, the open door means more than literally keeping your door open. It means getting out to talk to employees, initiating conversation, and keeping a finger on the pulse on the work environment. However, human resources

professionals can do more than serve as a conduit for communicating information and policies from upper management down. Savvy management knows that human resources professionals can be an invaluable source of information of what issues are of concern to employees. By providing this input to management, and assisting in developing strategies and responses to these concerns, human resources departments can make the organization seem, and actually be, more proactive, responsive, and respectful of employee concerns.

3. **Give Employees Knowledge of Value of Employee Benefits**. In this time of increasing healthcare and other benefits costs, employers should take the opportunity to point out to employees how valuable their benefits are. Companies are increasingly realizing that employees are largely unaware of the dollar value of their benefits packages. Using easy-to-understand charts, many employers are now providing benefits statements to employees that tabulate the real value of employee compensation. Such a valuation takes into account not just monetary compensation but medical and disability benefits, insurance, pension, and other benefits.

4. **Let Employees Know the Company is Working with Them, not Against Them**. It is easy for employees to get in the mindset of "us versus them" when it comes to management. Negative employees influence each other at work and even worse, can infect the attitudes of positive-minded employees. Employers must practice collaboration and inclusiveness to avoid unwittingly feeding this "us versus them" mentality. Let employees know that you and the organization are working with them toward a common goal.

One answer is to give employees a chance for input. Communication is a two-way street. Employees lose trust when they are not consulted. Conversely, if we can make constructive changes based on employees' input, this will go a long way towards rebuilding trust. Human resources professionals can be an integrated link to management in this process, advising it of employee consensus. Human resources professionals should prioritize this communication as key to confidence building.

Another key is letting managers and employees in on business goals and objectives (*see* below). Employees who feel a part of the bigger picture, and realize they are working with management toward a common goal, can resist the temptation to allow daily annoyances and other job stressors to translate into a perception that management is working against them. This must go beyond a broadly-worded mission statement to include a practical understanding of the business' long- and short-term goals and how the individual employee's performance fits into realizing those goals. Human resources professionals can perform a critical role in facilitating this communication.

5. **Don't Sit Behind Your "Open Door Policy."** Most companies have "open door" policies, encouraging employees to come forward with concerns. It is no longer workable to simply have an open door policy, and then allow managers to sit behind their open doors and wait for employees to come to them with concerns. Instead, managers should be expected to come out of their offices and get into the trenches with the employees to see if the changes are working.

Transparency includes *doing, not just saying*. Encourage your managers to practice "management by walking around"—simple gestures like checking in and asking about details of work. These behaviors set an expectation among employees that managers want to know about concerns. Managers who get into the trenches with employees can expect employees to open up at a greater level, and will help them obtain the feedback they need to determine if changes at every level are working.

F. Reanalyze Litigation From a Trust Perspective-Test and Defend Your Position

Thinking about employee litigation in the context of reestablishing employee trust at first seems to be a dysfunctional and unimaginable concept. There is no question that litigation can be difficult, time-consuming, costly and internally divisive. No matter what the outcome, it can leave hurt feelings and wounded careers in its wake. Nonetheless, if management, particularly management aspiring to industry leadership status, considers litigation not as an isolated series of battles but as part of the overall aspect of company existence, it can actually provide a forum for restating values.

As a prerequisite to this novel view of litigation, your company should have reevaluated its policies, statement of ethics or code of conduct, and communication strategies, and done everything else necessary to arrive at a defined corporate culture marked by a commitment to reestablishing a bond and a sense of common cause between management and employees. We have discussed earlier the importance of "walking the talk" and it is, of course, critical that a company stay on the new path it has chosen in terms of operations.

The corollary is that when a challenge is presented in the form of an administrative charge or an employee lawsuit, the company should not reflexively take any one course, be it a determination to settle quickly, or engage in a battle to the

end. Rather, it should view each claim in the context of the policies at issue and choose its battles. If your own investigation shows that the claimant was not treated properly and with integrity, then consider how to make it right rather than embarking on a slash and burn defense litigation. On the other hand, for example, if your company has invested time and effort in developing a whistleblower protection policy and a system by which such claims of retaliation are reported, investigated and dealt with, and if you have communicated all of the above clearly and specifically to your workforce, and if the employee claiming retaliation has not availed himself or herself of those avenues, it may be appropriate to mount a firm and unwavering defense.

Consider also how you might portray your defense of a claim, internally or externally, so as to foster an increase in trust. The standard advice (because of defamation concerns) is to stick to the now hackneyed script, "We believe the claim is baseless and we intend to vigorously defend it." In the proper case, it may be worth the risk to go farther and send the message that your litigation strategy is consistent with your corporate values. For example, "We have a firm commitment to allowing employees to come forward with concerns about corporate conduct and have promised that any employee who does so has absolute protection for his or her job. In this case, Mr. Jones did not bring his concerns to the company's attention until after he had resigned and sued. We believe that this was not the right way to handle it and is not the proper forum for an examination whether his allegations are correct." Another possibility might be, "Our human resources staff investigated Ms. Johnson's claim, reviewed all the pertinent documents and interviewed six people. We respect her right to her view of what happened, but we are confident that no one did anything improper and we will defend the system we have developed for reviewing such claims." In this way, the defense of the case can be presented as part of an overall culture of integrity.

If you have adopted, or are considering adopting, an alternative dispute resolution system, such as arbitration, consider how the ADR system either enhances or undermines employee trust. A fair, well-designed system that provides real benefits to employees (*e.g.*, true ease of access, prepaid legal services, peer review) can help improve employee trust. On the other hand, a system tipped too far toward limiting employee rights can easily send the opposite message. A skewed ADR system is also likely to be invalidated by the courts, which are increasingly scrutinizing arbitration agreements under newly developed standards of unconscionability.

Regardless of how the claim is resolved, use it take a clear and dispassionate look at the department, practice or other aspect of the company under examination in the action. We recommend involving someone with no "turf" at stake to review the situation and consider what changes, if any, should be made to avoid similar claims. Your legal counsel should also be able to provide you their view of the "lessons" of the case, what you can do differently or better to prevent future problems.

Consider non-standard settlement options. The way most cases end is with a transfer of money, but depending on the employee, other incentives to a quick resolution can be put into the mix. Job transfers with retraining, counseling, development of objective performance criteria to avoid the perception of unfair treatment-these are only some of the possibilities a company can consider to try to resolve disputes in a way other than what many employees will see as buying off the plaintiff and his or her attorney. Obviously, not every plaintiff merits this treatment but in certain circumstances, a demonstrated willingness to break from the standard practices can send a strong message, not just to the employee affected, but to others as well.

Also consider the privacy and sensitivity of the employees involved in the case, including the plaintiff if he or she is still an active employee. Most employees will understand if the decision is made to fight, but non-party witnesses should be treated with respect, and should be told that all you want and expect out of them is the truth. Obviously, retaliation against a plaintiff is forbidden, but in addition, we recommend that to the extent possible, the fight not be personalized. Employees without a direct stake in the action tend to recognize and appreciate when the matter is not made personal and when they are not made to feel that they must choose between their job and their friends and co-workers. They will understand why you feel you need to fight and respect you for how you are doing so.

Finally, you need to consider how the outcome will be perceived inside your organization. Consider whether a potential settlement will be seen as a cynical attempt to buy off a problem or an attempt to prevent a potentially nasty fight. Also think about whether a bad result at trial will be taken as confirmation of a lack of corporate integrity or merely an unlucky result from the litigation lottery flowing from the company's determination to stand up for its policies and positions. There is, of course, no easy way to answer these questions, except to note that a reflexive policy either to settle or not to settle will preclude the careful consideration that is required.

EXHIBIT A: See BNA Daily Labor Report, Special Edition:

Telephone companies	California, Ch. 183
Private Security Patrol	California, Ch. 609
Individuals who manually or electronically roll fingerprint impressions	California, Ch. 623
Licensing of persons to manage certain mental health services facilities	California, Ch. 642
Supervisory employees and applicants at ski-area child care facilities	Colorado, Ch. 140
Certain specific employees and licensees such as executive officers, directors of certified domestic companies, bail bond agents, real estate brokers, private school employees, certain school district employees, etc.	Colorado, Ch. 257
Applications for employment at nursing care facilities	Colorado, Ch. 297
Owners, directors and chief financial officers of licensed substance abuse rehabilitation service providers and employees in same who work with children and developmentally disabled adults	Florida, Ch. 2002-196
Applicants at licensed personal care homes	Georgia, Act 854
Applicants for peace officer positions	Illinois, P.A. 92-533
Applicants for permanent employee registration card for private detectives, private alarm personnel, private security personnel and locksmiths.	Illinois, P.A. 92-833
Employees of State Department of Administration with unescorted access to data center, telecommunications facilities, and other security-sensitive areas	Kansas, Ch. 6
Public and private school employees or volunteers who may have direct, unmonitored contact with children; access permitted to criminal records on contractors/laborers on school grounds.	Massachusetts, Ch. 385
Health care facility employees and contractors	Michigan, P.A. 303
Prospective employees of licensed private security guard and alarm system installers.	Michigan, P.A. 473
Licensed private detectives and investigators.	Michigan, P.A. 474
Hospice providers and employees, contractors and volunteers	Minnesota, Ch. 252
Licensed private detectives and protective agents, applicants for school bus drivers' license	Minnesota, Ch. 321
Employees in certain social service programs	Minnesota, Ch. 375
State Department of Education, applicants for school attendance officer	Minnesota, Ch. 357
Applicants for armed detective license or security licenses	New Hampshire, Ch. 280
Administrators of assisted living residences	New Jersey, Ch. 25
Airport screeners check expanded	New Jersey, Ch. 73
Applicants for state license in health care profession	New Jersey, Ch. 104
Employees in Securities Industry	New York, Ch. 453

Nursing facilities-applicants for non-licensed service jobs, checks must be completed prior to hire.	Oklahoma, Ch. 470
Applicants for state certification as an administrator of assisted living facility and applicants for employment who would have access to residents or residents' belongings	Rhode Island, Chs. 02-157 and 02-158
Amendment to require checks for employees and applicants at public and private schools such that state or local police may run check	Rhode Island, Chs. 02-227 and 02-413
Direct caregivers at nursing homes, adult care facilities, home health agencies, and commercial residential care facilities	South Carolina, Act. 242
Employees of security businesses	South Carolina, Act 339
Applicants for employment at licensed alarm businesses	South Carolina, Act 358
Applicants for licensed or registered nursing positions	Utah, Ch. 290
Unarmed security guards	Virginia, Chs. 578 and 597
Substance abuse treatment professionals	Virginia, Ch. 712
Applicants for child care provider license	West Virginia, Ch. 165.

EXHIBIT B: See BNA Daily Labor Report, Special Edition:

Workers who serve children	District of Columbia, Law 14-641, Act 14-310
Counties and municipalities authorized to require employees and applicants screening for positions critical to security or public safety	Florida, Ch. 2002-169
Licensed hospitals permitted access to state abuse registries to run background checks on employees and applicants	Iowa, Ch. 1034
State certified, non-public schools may run checks on newly certified hires	Kentucky, Ch. 285
Enactment of procedures for checks on license applicants including security guards and employees under jurisdiction of state horse racing commission; Department of Mental Health	Mississippi, Ch. 357
Highway patrol may release to employers, the address and offense of registered sex offenders for conduct checks on applicants for youth services agencies and care providers in contact with minors, patients, or residents	Missouri, S.B. 758
State transportation department may run checks on applicants of highway response operators and supervisors	Tennessee, Ch. 739